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Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, did the court of appeals err in refusing to defer to a Federal Communications Commission interpretation of Section 203 of the Communications Act making tariff-filing requirements optional for non-dominant communications common carriers, despite an express congressional delegation to the Commission of the power to "modify any requirement" of Section 203?

Did the court of appeals err in concluding that the Federal Communications Commission acted arbitrarily and capriciously when it chose to resolve a challenge to the lawfulness of an important FCC rule of broad application in a rulemaking, rather than in the adjudication in which the challenge was originally raised?

RULE 14.1(b) AND RULE 29.1 STATEMENTS

Pursuant to Rule 14.1(b) of the Rules of this Court, petitioner states that the list of parties in the court of appeals whose judgment is sought to be reviewed is as follows:

American Telephone and Telegraph Company
Federal Communications Commission
United States of America
MCI Telecommunications Corporation
Ad Hoc Telecommunications Users Committee
US Sprint Communications Company
US West Communications, Inc.
Ameritech Operating Companies
International Business Machines Corporation

Pursuant to Rule 29.1 of the Rules of this Court, petitioner states as follows:

MCI Telecommunications Corporation is a telecommunications common carrier providing domestic and international telecommunications and information services. It is a wholly-owned subsidiary of MCI Communications Corporation, a publicly held corporation. MCI Telecommunications Corporation owns 30% of General Communications, Inc., a publicly held corporation, which provides telecommunications service in Alaska.

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PETITION FOR WRIT OF CERTIORARI

Petitioner MCI Telecommunications Corporation ("MCI") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above proceeding on November 13, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 978 F.2d 727, and is reprinted at pages 1a to 19a of the Appendix to this petition ("Pet. App."). This opinion reversed a decision of the Federal Communications Commission ("FCC" or "Commission") dismissing an administrative complaint brought by the American Telephone and Telegraph Company ("AT&T") against MCI. The Commission's decision is reported at 7 FCC Rcd 807 (1992), and is reprinted at pages 20a to 30a of the Appendix. The Commission's subsequent Report and Order in a rulemaking proceeding initiated to address the issues raised

by AT&T's complaint is reported at 7 FCC Rcd 8072 (1992), and is reprinted at pages 33a to 66a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 13, 1992. The District of Columbia Circuit denied a timely filed petition for rehearing on January 21, 1993. The jurisdiction of this Court to review the judgment of the District of Columbia Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 203 of the Communications Act of 1934 provides in pertinent part:

> **47 U.S.C. § 203. Schedules of charges**
>
> **(a) Filing; public display.**
>
> Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system . . . . Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.
>
> **(b) Changes in schedule; discretion of Commission to modify requirements.**
>
> (1) No change shall be made in the charges, classifications, regulations, or practices which have

been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates.

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder . . . .

STATEMENT OF THE CASE

The Communications Act of 1934 ("the Act"), 47 U.S.C. §§ 151 *et seq.*, created the Federal Communications Commission ("the Commission") to regulate the developing telecommunications and broadcast industries "so as to make available, so far as possible, . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." *Id.* § 151. This case concerns one aspect of that regulatory regime, Section 203, 47 U.S.C. § 203, which establishes a tariff-filing mechanism for communications common carriers.

1. *The Competitive Carrier Proceeding*

a. *Development of the Permissive Tariffing Regime*

Until the 1970's, AT&T enjoyed, by virtue of its ownership of the vertically-integrated Bell System, a *de facto* monopoly over interstate telephone service. At that time, competitive challenges to the Bell System

began to develop as a result of advances in technology, which reduced the amount of investment required to enter the market, and Commission decisions, which permitted competition in certain services.

In response to the emergence of competitors to AT&T, the Commission in 1979 commenced a rulemaking, called the *Competitive Carrier* proceeding, to consider the proper scope of regulation in the new era of competition. In its *First Report and Order* in the rulemaking, the Commission determined that the tariffing requirements of Section 203 should be applied differently to "dominant" carriers, which possessed sufficient market power to set prices contrary to the goals of the Communications Act, and "non-dominant" carriers, which lacked such power. 85 F.C.C. 2d 1, 20-21 (1980). The Commission adopted "streamlined" tariff rules for certain non-dominant carriers. 85 F.C.C. 2d at 30-38.

In 1981, the Commission proposed that the obligation on certain non-dominant carriers to comply with the tariffing requirements of Section 203 be made "permissive," *i.e.* optional. *Further Notice of Proposed Rulemaking*, 84 F.C.C. 2d 445. The Commission noted that imposing tariffing requirements on competitive firms without market power "has worked the perverse effect of imposing a measure which (1) is superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation." 84 F.C.C. 2d at 478-79. Carefully reviewing the legislative history of Section 203 and decisions construing it, the Commission expressly concluded that its power under Section 203(b) to "modify *any* requirement . . . of this section" authorized "remov[al] of the requirement of tariff filings where appropriate." 84 F.C.C. at 478-80 (emphasis in original).

In 1982, the Commission formally adopted the permissive tariffing rules for one group of carriers, domestic

resellers of telecommunications services who do not own facilities. *Second Report and Order,* 91 F.C.C. 2d 59 (1982). In 1983, these rules were extended to cover resellers operating on domestic off-shore points. *Third Report and Order,* 48 Fed. Reg. 46,791 (Sept. 28, 1983).

b. *The Fourth and Sixth Reports*

In its *Fourth Report and Order,* the Commission extended the permissive tariffing rules to non-dominant facilities-based carriers such as MCI. 95 F.C.C. 2d 554 (1983). The Commission carefully analyzed the relevant product and geographic markets to determine that these carriers lacked market power. 95 F.C.C. at 562-75. It noted that, based upon its three years of reviewing streamlined tariffs from non-dominant carriers, "[t]here is no evidence that it is in the public interest for us to continue receiving . . . [these tariff] filings . . . to prevent them from charging unjust or unreasonable rates or making service unavailable." 95 F.C.C. 2d at 578 & n.79. The Commission further noted that "[i]t is costly for carriers to prepare tariff-filings under our rules for dominant carriers . . . [and] these filings can impede entry, impair competitive pricing, and facilitate collusive conduct." *Id.* at 555 n.1.

The Commission concluded:

> [W]e believe that the purposes of the Communications Act are best satisfied by reduced entry, exit, and pricing barriers and burdens for non-dominant carriers. Such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs. Consequently, users pay higher rates and there is limited availability of services satisfying users' needs. Generally, the Commission has the duty to determine that its rules promote the public interest when applied to particular carriers or applicants, and to refrain from imposing and to remove unnecessary regulatory burdens on carriers. Furthermore, the Commission has broad discretion

> in choosing how to regulate and can modify its procedures in light of changing market conditions. . . . [T]he Commission may use various methods, including some reliance on market forces, to arrive at just and reasonable rates. The combination of our ability to investigate rates of non-dominant carriers in response to complaints or on our own initiative and market forces will ensure that these carriers' rates are just and reasonable.

95 F.C.C. 2d at 579-80 (footnotes omitted).[1]

In 1985, the Commission sought to go beyond the permissive tariffing rules and *forbid* non-dominant carriers from filing tariffs of any sort. *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985). MCI opposed *mandatory* detariffing as inconsistent with the flexibility that the Commission's permissive tariffing rules were intended to promote. Though expensive and cumbersome, tariffs do provide certain legal protections that, for some carriers, justify their cost.[2]

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[1] Although itself a dominant carrier, AT&T sought and obtained permissive tariffing treatment for resale activities by a subsidiary. In that proceeding, AT&T conceded—and defended—the Commission's authority under the Act to exempt non-dominant carriers from the tariffing requirements of Section 203. Brief for Intervenor AT&T, at 18, *MCI Telecommunications Corp. v. FCC*, No. 84-1402 (D.C. Cir., filed Jan. 9, 1986).

In addition, AT&T has itself been a beneficiary of streamlining by the Commission. Just as the Commission eased tariff requirements on non-dominant carriers through permissive tariffing, the Commission has taken steps to reduce substantially the tariff obligations applicable to AT&T. *See Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880 (1991).

[2] Prior to the *Fourth Report and Order*, MCI filed tariffs for all its services. Following that decision, MCI has continued to file tariffs for most services. Like AT&T and other carriers, MCI contracts with some customers at negotiated rates. AT&T is required by the Commission to file these negotiated rates after the contract is signed. *MCI v. FCC*, 917 F.2d 30, 33 (D.C. Cir. 1990). MCI, like other non-dominant carriers relying on the permissive tariffing rule, may or may not tariff these negotiated rates.

Upon review, the D.C. Circuit vacated the mandatory detariffing rules of the *Sixth Report and Order*, stating that Section 203(b) did not authorize the "wholesale abandonment or elimination of . . . [the tariff filing] requirement." *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1192 (D.C. Cir. 1985). The court expressly declined to consider the issue of permissive tariffing, even though the issue had been raised. *Id.* at 1190 n.4.[3] The panel distinguished permissive tariffing, holding that the FCC "fundamentally altered" that policy when it implemented the *Sixth Report and Order*. *Id.* at 1190.

2. *AT&T's Complaint Before the Commission*

On August 7, 1989, four years after the D.C. Circuit decision on the *Sixth Report and Order*, almost six years after the *Fourth Report and Order*, and seven years after the permissive tariffing rule was adopted in the *Second Report and Order*, AT&T filed an administrative complaint with the Commission alleging that MCI had violated Section 203 by providing untariffed services to certain large business customers. The complaint stated that AT&T and MCI each had submitted bids for the business of these customers, who thereafter selected MCI. AT&T sought damages because MCI did not subsequently incorporate the terms of its bid into a tariff on file with the Commission. AT&T Complaint ¶¶ 7-18. AT&T did not explain how this failure had affected competition or had injured the interests of AT&T or of the customers.

In a letter to the Commission accompanying the complaint, AT&T stated it was aware that the Commission's rules provided "different regulatory treatment" for dominant and non-dominant carriers, and that the rules made optional the filing of tariffs by non-dominant carriers. However, AT&T had filed the complaint to challenge those rules as inconsistent with Section 203. The letter

[3] The panel described its inquiry narrowly: "whether the Commission has statutory authority to *prohibit* common carriers from filing tariffs." *Id.* at 1188 (emphasis in original).

reflected that AT&T's principal objection was *not* to the tariff requirements for non-dominant carriers. Rather, AT&T complained that the relaxed tariff rule had not been extended to AT&T's operations. In AT&T's view, "[t]he Commission's regulatory reforms have not kept pace with the fierce growth of [long distance] competition. Rather than a temporary, transitional measure, the *Competitive Carrier* structure has become a seemingly-permanent imbalance that imposes onerous regulatory requirements uniquely and unfairly on one participant in an intensely competitive market." [4]

MCI admitted providing service to certain large business customers on a non-tariffed basis, but argued that it could not be held liable because it had followed the Commission's rules. MCI noted that AT&T did not challenge the permissive tariffing rules when they were issued, and had not been injured by MCI's conduct. Because tariffing occurs after a contract has been negotiated, AT&T could not claim to have lost business as a result of MCI's non-tariffing.

Because AT&T styled its challenge to the permissive tariffing rules as an administrative complaint, Section 208(b) of the Communications Act, 47 U.S.C. § 208(b), provided that the Commission should issue a ruling within 12 months. On July 3, 1990, the Commission transferred the complaint from its enforcement branch to its policy division because of the pendency of a rulemaking proceeding which was considering whether tariffing requirements on AT&T should be relaxed. Pet. App. 24a n.16. That proceeding was completed on September 16, 1991. *See Competition in the Interexchange Marketplace*, 6 FCC Rcd 5880.

3. *Dismissal of AT&T's Complaint and Institution of the Rulemaking*

On October 4, 1991, AT&T petitioned the D.C. Circuit for a writ of mandamus directing the Commission to rule

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[4] *See* Letter from Francine Berry to Donna Searcy, Secretary, Federal Communications Commission, dated August 7, 1989.

on its complaint against MCI. The Commission responded that it would promptly address the complaint and, on January 24, 1992, the D.C. Circuit dismissed the petition for mandamus. *In re AT&T*, No. 91-1487 (D.C. Cir.).

On January 28, 1992, the Commission dismissed AT&T's complaint to the extent that it sought prospective invalidation of the permissive tariffing rule enunciated in the *Competitive Carrier* rulemaking proceeding. The Commission concluded that AT&T's claim, "while nominally stated in terms of a request for relief against MCI, is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule." Pet. App. 27a-28a.[5] The Commission decided, in an explicit exercise of its discretion under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), *see* Pet. App. 28a, that a rulemaking proceeding was a more appropriate vehicle to consider the issues AT&T raised:

> The Commission's forbearance rule was adopted in a notice and comment rulemaking proceeding and has been in place for almost ten years. This rule represents one of the cornerstones of our regulation of the long-distance industry. Any change in this fundamental policy would have a significant impact on a broad range of customers and providers of telecommunications services across the nation. It would be inappropriate for us to consider a modification or repeal of this policy, with so potentially widespread an impact, in the context of a two-party adjudicatory proceeding, as opposed to a rulemaking proceeding. In a rulemaking, all interested parties will have the opportunity to comment. In addition, a rulemaking proceeding will permit us to address

[5] The Commission noted that AT&T's complaint was not "an attempt to enforce the substantive provisions of the statute," but instead was an attempt to "us[e] the complaint process in order to attempt to change a longstanding Commission rule." Pet. App. 22a at n.9. Indeed, AT&T withdrew any claims that MCI violated the Act's substantive provisions, which require that rates be reasonable and nondiscriminatory, thereby removing any facade that the challenge was aimed at MCI, rather than the rule itself.

> our forbearance rule as it applies to all nondominant carriers, and to consider and implement any changes that we may make to it on an industry-wide basis. Given the fundamental importance of these matters, the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may be necessary.

Pet. App. 28a (footnote omitted).

To the extent that AT&T's complaint sought retroactive relief against MCI for compliance with the Commission's permissive tariffing rule, the Commission denied the complaint. According to the Commission, MCI "at all times complied with what the Commission . . . has said MCI may do, *i.e.*, provide interstate telecomunications service at rates and on terms that are not contained in tariffs with the Commission." Pet. App. 26a. The Commission termed the *Fourth Report and Order* a "binding substantive rule that removed the requirement that nondominant carriers such as MCI file tariffs." *Id.* Under such circumstances, it would be "manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability." *Id.* The Commission did not, in the context of AT&T's claim for damages, prejudge the issues that would be considered and addressed in the rulemaking initiated as a result of AT&T's complaint.

On the same day, the Commission instituted rulemaking to examine the issues raised by AT&T's complaint. *Tariff Filing Requirements for Interstate Common Carriers*, 7 FCC Rcd 804 (1992). More than 40 parties, including AT&T, submitted comments in response to the Commission's notice.

4. *AT&T's Appeal and the Opinion Below*

Although the Commission was proceeding expeditiously with the rulemaking on the issues raised by AT&T's complaint, AT&T nevertheless petitioned the D.C. Circuit for

review of the dismissal of its complaint. In briefing before the appeals court, both the Commission and MCI argued, *inter alia*, that the court should not decide in the first instance the validity of the Commission's permissive tariffing rules, which were being considered in the rulemaking proceeding.

On November 5, 1992, the Commission announced the results of the rulemaking proceeding, re-affirming the validity of the permissive tariffing rules. The court of appeals was informed that the Commission's formal Report and Order, setting forth the Commission's interpretation of Section 203 and the policy justification for permissive tariffing, would be forthcoming; such reports issue within 30 days of announcement of a ruling. Nevertheless, on November 13, 1992, before receiving the text of the Commission's rulemaking decision, the D.C. Circuit issued its decision.

The opinion reversed the Commission's dismissal of AT&T's complaint as "arbitrary and capricious." *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992); Pet. App. 1a. The panel stated it was "apparent that, because the Commission fears the *Fourth Report* cannot withstand judicial scrutiny (at least in our court), it wants to avoid judicial review of the rule." *Id.* at 731; Pet. App. 8a. The panel refused to defer to the Commission's traditional discretion to select between rulemaking and adjudication and held that the Commission had been obligated to rule on the merits of AT&T's complaint. *Id.* at 732; Pet. App. 12a. To defer resolution of AT&T's challenge to a rulemaking proceeding was, the court found, "similar to a judge dismissing a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has the obligation to decide the complaint under the law currently applicable." *Id.* (citing *Meredith Corp. v. FCC*, 809 F.2d 863, 873 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1019 (1990)); Pet. App. 9a.

The panel also rejected the Commission's statement that it had deferred to the rulemaking proceeding consideration of the permissive tariffing rule. Despite the Commission's express statement to the contrary, the panel ruled that the Commission's decision to dismiss the complaint necessarily relied on the validity of the *Fourth Report and Order*: "There is no conceivable basis for the agency's action other than a temporary reliance on the *Fourth Report's* interpretation of the statute as a valid statement of the law." *Id.* at 734 (emphasis omitted); Pet. App. 14a. The panel then proceeded to address the merits of AT&T's complaint and, upon review, held that the court's earlier decision invalidating the Commission's mandatory detariffing rules, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), "foreclose[d] the Commission's argument in this case":

> We said in *MCI* that the language of section 203(b) "suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." [765 F. 2d at 1190.] To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." *Id.* (quoting Black's Law Dictionary 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligation to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act.

978 F.2d at 736 (footnote omitted); Pet. App. 16a.[6]

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[6] In a timely petition for rehearing, MCI sought to bring the *November 25 Report and Order* to the attention of the court, and to encourage the court to reconsider its decision in light of the Commission's later-issued decision. On January 21, 1993, the court denied the petition without comment.

5. *The November 25 Report and Order*

In November 25, 1992, the Commission released the text of its formal Report and Order in the rulemaking proceedings. In the *November 25 Report and Order*, the Commission completed a comprehensive analysis of the importance of and need for the permissive tariffing rule, and of the Commission's authority under the Communications Act of 1934 to implement such a policy. *See* Pet. App. 33a. The Commission concluded that Section 203(b) empowered it to exempt certain common carriers from the tariffing requirements of Section 203(a). The Commission noted that although Section 203(a) states that "every carrier" shall file tariffs for common carrier services, Section 203(b) specifically permits the Commission to "modify any requirement made by or under the authority of this section . . . by general order applicable to special circumstances or conditions." As the Commission concluded, "by its terms, Section 203(b) limits the . . . modification power in one circumstance only—the FCC may not expand the 120-day notice period for tariff filings." Pet. App. 43a. The existence of this single, narrow limit on the Commission's modification power "strongly suggests that Congress did not otherwise intend to limit that power." *Id.*

The Commission also concluded in the *November 25 Report and Order* that Congress is fully aware of the permissive tariffing policy, and has acquiesced in that policy. Pet. App. 51a. The Commission explained that Congress' "recent enactment of the TOCSIA [the Telephone Operator Consumer Services Improvement Act of 1990] . . . demonstrated its awareness" of permissive tariffing, and that Congress "made no effort to disturb it." Pet. App. 52a (citing S. Rep. No. 101-439, 101st Cong., 2d Sess. 3 & n.10) (Aug. 30, 1990)). In enacting TOCSIA, Congress specifically legislated to impose tariffing requirements for a subset of services by nondominant carriers—an action that would have been wholly gratuitous had Section 203 been understood as

imposing an unwavering tariff requirement. Pet. App. 53a. The Commission noted that contemporaneous with the consideration of TOCSIA, Congress amended Section 203 itself and left the Commission's permissive tariffing policy undisturbed. *Id.*

Finally, in the *November 25 Report and Order*, the Commission once again carefully reviewed the rationale for the permissive tariffing policy. Pet. App. 56a. The Commission concluded that a reversal of the permissive tariffing policy would thwart the purposes of the Communications Act. Permissive tariffing "has played a major role in the rapid development of competition and in the consumer benefits that have resulted." Pet. App. 59a. The Commission determined that "but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered the competitive fray at all." *Id.*

6. *Subsequent Proceedings*

AT&T has petitioned the D.C. Circuit for review of the *November 25 Report and Order*. *See American Tel. and Tel. Co. v. FCC*, Nos. 92-1628 & 92-1666 (D.C. Cir.), and has moved for summary reversal. The petition and motion remain pending as of this date.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS' DECISION TO INVALIDATE THE COMMISSION'S PERMISSIVE TARIFFING POLICY DEPARTS FROM SETTLED PRINCIPLES OF ADMINISTRATIVE LAW AND THREATENS THE FOUNDATIONS OF IMPORTANT FCC POLICIES DESIGNED TO ENHANCE COMPETITION IN THE LONG DISTANCE MARKET.

The court of appeals held that Commission's permissive tariffing policy—the "cornerstone" of the regulatory structure for the long distance market—was an impermissible application of Section 203(b) of the Communi-

cations Act. That ruling conflicts with the "dominant, well-settled principle of federal law" requiring "judicial deference to reasonable interpretations by an agency of a statute that it administers," and with cases applying that principle in closely analogous circumstances. *National R.R. Passenger Corp. v. Boston & Maine Corp.*, 112 S. Ct. 1394, 1401-02 (1992); *see Sullivan v. Everhart*, 494 U.S. 83, 92-93 (1990); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Plenary review is warranted because the court of appeals' obvious departure from these settled principles threatens the foundations of important FCC policies. *Cf. Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 644 (1990).

A. The Court of Appeals' Ruling Raises Significant Issues Respecting The Appropriate Level of Deference To Be Afforded The Commission's Interpretation of Section 203(b).

The Commission's permissive tariffing policy is an exercise of authority expressly delegated by Congress in Section 203. *See November 25 Report and Order*, Pet. App. 33a. Section 203(b) empowers the Commission to "modify any requirement made by or under the authority of this section either in particular circumstances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). On its face, this language authorizes modification of "any" statutory requirements of Section 203(a), including the "requirement" that carriers file tariffs. The issue, therefore, is whether the Commission's permissive tariffing policy was a proper exercise of its delegated authority to "modify" that requirement.

The court of appeals concluded that Section 203(b) delegated only a "limited authority" to the Commission to alter Section 203(a)'s tariff-filing requirement. Indeed, the court construed its prior decision in the "mandatory detariffing" case, *MCI Telecommunications Corp. v. FCC* —which had expressly reserved the issue whether Section

203(b) authorized permissive tariffing—to *foreclose* that issue. Quoting Black's Law Dictionary, the appeals court interpreted "modify" to mean " 'alter; to change in incidental or subordinate features.' " Pet. App. 17a. Permissive tariffing, in the court's view, amounted to more than an incidental change, and thus exceeded the authority Congress had delegated to the Commission.

Nowhere in the opinion did the court discuss the principles that should have governed its analysis.[7] That omission is telling. Under *Chevron*, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Chevron*, 467 U.S. at 844. Rather, the reviewing court must consider whether "Congress has . . . directly addressed the precise question at issue." 467 U.S. at 842-43. If not, the reviewing court must affirm any reasonable agency interpretation of the statutory provision. *Id.* The court of appeals' opinion raises important questions respecting the application of these principles to Section 203(b)—a provision of major importance to the Commission's current regulatory program.

When Congress enacted Section 203(b) in 1934, it plainly did not intend to speak to the "precise question" whether Section 203's tariff-filing requirements could be made optional for non-dominant long distance carriers in an emerging competitive market. Such foresight would have been astonishing. In 1934, Congress looked out

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[7] *Chevron* received mere passing mention. 978 F.2d at 735 n.11. In this footnote, the court noted that its prior decision in *MCI Telecommunications Corp. v. FCC*—the decision the court held had disposed of the *Chevron* issue before it—never mentioned *Chevron*. *See* Pet. App. 16a & n.11.

Indeed, the court of appeals appeared to have little interest in the Commission's views of the statute. The court issued its ruling in November 1992, despite having been put on notice that the Commission would shortly issue a report and order setting forth its interpretation of Section 203 and the lawfulness of the permissive tariffing policy. *See* page 11 *supra*.

at a telephone industry dominated by AT&T.[8] The use of tariffs and other pricing controls of the kind included in the Communications Act, in a regime of close government supervision, was—then as now—a commonly accepted method of protecting consumers from monopoly practices. Congress did not consider whether tariffs were an appropriate burden to impose on non-dominant carriers (which did not exist in 1934) subject to the discipline of a competitive market.

Congress did directly address the need for the Commission to have versatile authority to tailor the new statutory scheme to the evolving circumstances of a complex industry. Congress expressly delegated flexible powers to the Commission under Section 203 to regulate in accord with its views of what the public interest requires. This Court has made clear that deference is particularly appropriate where, as here, an agency is "explicitly delegated authority to construe the statute by regulation." *United States v. Morton*, 467 U.S. 822, 834 (1984).[9] The delegation in Section 203(b) is thus consistent with the overall scheme of the Communications Act, which is, as this Court has recognized, "a supple instrument for the exercise of discretion by an expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *Cf. NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 128 (1987).

The court of appeals nonetheless concluded that the statutory text precluded the Commission's interpretation of Section 203(b). To reach this result, the court of

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[8] *See, e.g.*, S. Rep. No. 781, 73d Cong., 2d Sess. 87 (1934).

[9] *See also* 47 U.S.C. § 154(i) (empowering the Commission to "make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions"); *New England Tel. & Tel. v. FCC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (terming § 154(i) a "necessary and proper clause").

appeals applied a rule of construction that conflicts directly with this Court's precedents. Reviewing courts may forego deference to agency interpretations only if the statutory term at issue "cannot bear the interpretation adopted by the [agency]." *Sullivan v. Everhart*, 494 U.S. at 92. Webster's Dictionary alternatively defines "modify" to mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." *See* Webster's Ninth New Collegiate Dictionary 763 (1988). The latter definition comfortably encompasses the Commission's permissive tariffing policy. The court of appeals, however, simply chose to ascribe the former—narrow—meaning to the statutory text.

This Court repeatedly has held that "the existence of alternative dictionary definitions . . . each making some sense under the statute itself indicates that the statute is open to interpretation." *National R.R. Passenger Corp.*, 112 S. Ct. at 1402; *accord Sullivan v. Everhart*, 494 U.S. at 91-92.[10] "Few phrases in a complex scheme of regulation are so clear as to be beyond the need for interpretation when applied in a real context." *Boston & Maine Corp.*, 112 S. Ct. at 1402. The appeals court's determination as to whether *Chevron* deference was due in this case thus conflicts directly with the approach set forth in *Boston & Maine Corp.* and *Everhart*. As these decisions make clear, the word "modify" in Section 203(b)

[10] Indeed, this case is much like *Boston & Maine Corp.* At issue in that case was the meaning of the word "required" in a statute authorizing condemnation of property "required" for Amtrak's operations. The D.C. Circuit held that the statutory term was unambiguous, and conferred only a narrow condemnation authority where the desired property was "indispensable" to Amtrak's operation. This Court applied *Chevron* and reversed. The Court acknowledged that "required" would bear the narrow meaning ascribed by the Court of Appeals, but found ambiguity because standard dictionary sources also contained broader definitions. This ambiguity was, as the Court made clear, sufficient to require *Chevron* deference.

is sufficiently ambiguous to require deference to the Commission's reading.

Indeed, it is the court of appeals' reading that cannot easily be squared with the text of Section 203. The court of appeals focused on the word "shall" in § 203(a) and termed it the "language of command." Pet. App. 16a (quoting *MCI v. FCC*, 765 F.2d at 1191 (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935))). "Shall" is not, however, such an imperative that it precludes a modification of the tariff requirement. As the Court in *Escoe* recognized, other indicia may demonstrate that "shall" was not intended to be mandatory.[11]

In Section 203(a), the word "shall" is directed entirely at private parties. It simply establishes that, absent any modification under Section 203(b) by the Commission, private parties must file tariffs. By its terms, this statutory language does not direct the Commission to take any action. The statutory language directed at the Commission is Section 203(b), which permits modification of the requirement that carriers "shall" file tariffs.

Moreover, Section 203(c) makes clear that the 1934 Congress provided for the possibility that carriers might lawfully offer untariffed service. That provision expressly states that:

> No carrier, *unless otherwise provided by or under authority of this chapter,* shall engage or participate in such communication unless schedules have been filed and published . . . .

47 U.S.C. § 203(c) (emphasis added). The provision—which the court of appeals never mentioned—expressly addresses the legality of carriers providing service without filing tariffs. It prohibits untariffed service "unless otherwise provided by or under authority of this chapter."

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[11] The panel's quotation from *Escoe* conveniently removes the language "a test significant, but not controlling." *Escoe*, 295 U.S. at 493. *See also Young v. Community Nutrition Institute*, 476 U.S. 974 (1986) (interpreting "shall" as permissive).

That proviso plainly presumes the existence of authority in the Commission to authorize untariffed service.[12] The placement of this provision is further evidence that Section 203(b) delegated far broader authority than the court of appeals presumed. The language in Section 203(c) immediately follows the sentence in Section 203(b) including the key word "modify." The Commission's power to "modify" thus must encompass the power to authorize permissive tariffing.[13]

Section 203(b)'s express withdrawal of the authority to modify the 120-day requirement provides further support for the Commission's reading. As the Commission found, the existence of this single, narrow limit on the Commission's modification power "strongly suggests that Congress did not otherwise intend to limit that power." *November 25 Report and Order*. Where, as here, Congress' intent is not manifest, the statutory construction principle *expressio unius est exclusio alterius* indicates that, by limiting the Commission's power in one specific way, Congress intended no other limits. *See TVA v. Hill*, 437 U.S. 153, 188 (1978).

Furthermore, as the Commission noted in the *November 25 Report and Order*, Pet. App. 51a, Congress has for many years been aware of the Commission's per-

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[12] The D.C. Circuit has in two prior cases presumed that § 203 authorizes the Commission to exempt certain carriers from the tariff requirements. *See Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 210-11 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Diamond Int'l Corp v. FCC*, 627 F.2d 489, 493 (D.C. Cir. 1980).

[13] This exception is significantly broader than the language in the Interstate Commerce Act ("ICA"), discussed at length in the concurrence and dissent in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). *See id.* at 136 (Scalia, J., concurring); *id.* at 137 (Stevens, J., joined by Rehnquist, C.J., dissenting). Although the Communications Act and the ICA are often analogous, they are in no sense "carbon copies." *American Tel. & Tel. Co. v. FCC*, 503 F.2d 612, 616 (2d Cir. 1974).

missive tariffing policy, and indeed has validated it.[14] In 1989, Congress enacted the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) to impose tariffs on a subset of non-dominant carriers; such a statutory change would have been redundant if § 203 imposed a uniform tariff obligation regardless of Commission action. The Senate Report on TOCSIA described permissive tariffing as it applied to operator service companies and explained that the Commission's approach had not been entirely successful. *See* S. Rep. No. 101-439, 101st Cong., 2d Sess. 3 & n.10 (1990) (citing the *Competitive Carrier* proceedings). TOCSIA requires the operator service companies to file informational tariffs, noting that it does not expect these to be as detailed as those filed by dominant carriers. TOCSIA also expressly permits the Commission to waive this requirement after three years. This regime clearly is premised on the existence, indeed on a baseline, of permissive tariffing—operator service companies would get no benefit from the waiver if they were required to tariff under Section 203. Thus, if the decision below stands, the clear congressional intent of TOCSIA will be thwarted.

When it specifically amended § 203(b) in 1990, Congress was plainly aware of the Commission's interpretation of that provision.[15] Congress' informed judgment not

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[14] *See, e.g., Long-Distance Competition: Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportaiton*, 99th Cong., 1st Sess., 105 (1985) (Statement of Commissioner James H. Quello) (explaining permissive tariffing); *Federal Telecommunications Policy Act of 1986: Hearings on S. 2565 Before the Senate Committee on Commerce, Science and Transportation*, 99th Cong., 2d Sess. 89 (1986) (Statement of Commissioner Fowler) (same).

[15] *See FCC and NTIA Authorizations: Hearings Before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce*, 101st Cong., 1st Sess. 30 (1990) (noting the distinction between dominant and non-dominant carriers).

to disturb the Commision's interpretation demonstrates that it approves of the Commission's reading. *See Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Young v. Community Nutrition Institute*, 476 U.S. 974, 983 (1986) (Congress' failure to change a scheme when revisited is persuasive evidence); *United States v. Rutherford*, 442 U.S. 544, 554 (1979) ("once an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation, although it has amended the statute in other respects, then presumably legislative intent has been correctly discerned").[16]

B. The Court of Appeals' Ruling Threatens Important Commission Policies That Foster Competition in the Long Distance Market.

Plenary review of the court of appeals' errant decision is warranted because that decision thwarts an important agency policy on which competitors like MCI have depended in their efforts to make the long distance market competitive. Permissive tariffing is a "cornerstone" of the Commission's regulatory policy for the long-distance market, and directly furthers the core purposes of the Communications Act. Even the court of appeals noted it had "no quarrel" with the policy. Pet. App. 18a. As the Commission has explained:

> [T]he effects of applying the tariff requirements of Section 203 to nondominant carriers frustrate the

[16] Congress also recognized recently that some common carriers were not required to provide service under tariff, but rather could provide service under contract. *See* Telephone Disclosure and Dispute Resolution Act (TDDRA), Pub. L. No. 102-556, 106 Stat. 4181 (1992). Thus, for example, Section 101(c) of the TDDRA directs the FCC to issue rules requiring common carriers that assign telephone numbers to pay-per-call service providers to comply with certain requirements "by tariff or contract"; and Section 101 (c)(6) states that "a common carrier shall prohibit by tariff or contract" certain uses of 800 numbers.

> underlying purposes of the Act. The advance publication of prices and other terms and conditions . . . has been clearly recognized as anticompetitive. . . . Applying tariff requirements to competitive entities . . . has worked the perverse effect of imposing a measure which is (1) superfluous as a consumer protection device, since competition circumscribes the prices and practices of these companies, and (2) stifles price competition and service and marketing innovation.

Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 478 (1981). *Accord November 25 Report and Order*, Pet. App. 58a-61a.

More than 200 long distance providers have structured their relationships with customers in reliance on the permissive tariffing rule. Invalidation of that rule threatens wholesale disruption of those relationships, and indeed threatens to impair the progress toward a competitive market achieved under the Commission's rules. Because the text of Section 203(b) is plainly sufficient to support the Commission's permissive tariffing rule, there is simply no warrant for imposing the anachronistic tariff-filing requirement imposed by the court of appeals despite the contrary finding of the agency.

II. THE COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURT OF APPEALS' SIGNIFICANT ERRORS OF ADMINISTRATIVE LAW AND TO PROTECT THE TRADITIONAL DISCRETION OF AGENCIES TO CHOOSE BETWEEN RULEMAKING AND ADJUDICATION.

The court of appeals held that the Commission abused its discretion by choosing a rulemaking rather than an adjudication to resolve AT&T's express claim that the *Fourth Report and Order* should be invalidated "as fundamentally inconsistent with the controlling, mandatory language of Section 203."[17] The court's ruling was plainly

[17] Letter from Francine Berry to Donna Searcy, Secretary, Federal Communications Commission, dated August 7, 1989.

a reaction to perceived delay in the Commission's proceedings. The decision nonetheless warrants plenary review because it conflicts with well-established legal principles that order the relationship between administrative agencies and reviewing courts. In its desire to discipline perceived agency recalcitrance, the court established an unprecedented limitation on the Commission's ability to choose between rulemaking and adjudication to resolve policy issues of general importance.

The consequences for the Commission are particularly severe. Any party unhappy with a longstanding FCC rule that it chose not to challenge on a timely basis when promulgated will be entitled under the guise of a Section 208 complaint proceeding—with statutorily prescribed time limits intended for resolution of much more limited disputes—to demand resolution of its challenge to the validity of that rule. Under the court of appeals' holding, it will be arbitrary and capricious for an agency to decline to resolve the merits of that challenge, irrespective of whether the complaining party is otherwise entitled to the relief sought, and irrespective of whether the rule's validity can appropriately be examined within the confines of adjudication.

This Court has long recognized that "the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). Indeed, to the extent administrative law principles constrain the choice, they express a strong preference for rulemaking. *See id.* at 202; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 292 (1974).

An agency cannot, in its quasi-judicial role, discard rules it has promulgated in its quasi-legislative role, pursuant to notice and comment procedures under the APA. *See NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969) (holding the rulemaking procedures of the APA

"may not be avoided by the process of making rules in the course of adjudicatory proceedings"); *Chenery*, 332 U.S. at 202. "So long as [a] regulation remains in force, the Executive branch is bound by it, and indeed the United States as the sovereign composed of the three branches is bound to respect and to enforce it." *United States v. Nixon*, 418 U.S. 683, 696 (1974). *See also Ruangswang v. INS*, 591 F.2d 39, 43 (9th Cir. 1978); *Ford Motor Co. v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981).

Courts of appeal routinely *require* agencies to proceed by rulemaking when a change in policy will result in harm to a party who reasonably relied on the agency's clear rule. *See, e.g., First Bancorporation v. Board of Governors*, 728 F.2d 434, 438 (10th Cir. 1984); *Natural Gas Pipeline Co. v. FERC*, 590 F.2d 664, 669 (7th Cir. 1979). These cases effectuate the principle that "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 448 U.S. 204, 208 (1988). An agency cannot apply new rules retroactively, absent an express delegation from Congress, *id.*, nor can it revoke a rule and apply a new standard to a private party by purporting to adjudicate. *See Natural Gas*, 590 F.2d at 669; *NLRB v. APW Prods Co.*, 316 F.2d 899, 906 (2d Cir. 1963); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 860 (2d Cir. 1965) (Friendly, J.) ("branding as 'unfair' conduct which was deemed 'fair' at the time the party acted raises judicial hackles"). Permitting such practices would circumvent the notice and comment procedures required by the Administrative Procedure Act.

In this case, the court of appeals apparently believed that these well-established principles should be ignored because the regulation at issue was challenged as contrary to law. However, the lawfulness *vel non* of the challenged regulation does not preclude the agency from choosing rulemaking. That point is well illustrated by *American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751 (D.C.

Cir. 1985), a case on which the court of appeals purported to rely. The case involved an adjudication applying a proposed rule, which the agency had withdrawn, rather than the regulation actually on the books. The validity of the current regulation was open to serious doubt. The court nonetheless held that:

> an agency seeking to repeal or modify a legislative rule promulgated by means of notice and comment rulemaking is obligated to undertake similar procedures to accomplish such modification or repeal. . . . *These fundamental principles would be vitiated if an agency could validly justify an adjudication on the ground that longstanding interpretation of the organic statute as reflected in validly adopted, existing legislative rules was erroneous.*

Id. at 759 (emphasis added). Then-Judge Scalia concurred to stress that the panel's holding did not *"hinge on the lawfulness of the regulation."* *Id.* at 760 (Scalia, J., concurring) (emphasis added). He noted that the agency rule at issue was, at best, "barely permissible." *Id. See also id.* (Scalia, J., concurring) ("the wrong of inconsistency is not righted by the further wrong that one of the inconsistencies is in addition unlawful").

Furthermore, a party's claim that an agency rule is unlawful cannot automatically entitle that party to adjudication of the claim. *Retrospective* relief of the kind afforded in adjudication may be rejected for reasons having nothing to do with the alleged invalidity of the agency regulation at issue. The agency may decide to deny relief because the complaining party has no standing, the complaining party's theory of damages is insufficient, or the respondent reasonably relied on the challenged regulation that the complaining party now claims is invalid. In any of those circumstances, the agency could properly deny retrospective relief without ever reaching the underlying merits of the claim. It simply cannot be that the agency lacks discretion in such circumstances to deny retrospective relief and to refer *prospective* issues con-

cerning the regulation's validity to a rulemaking proceeding, which administrative law recognizes as the preferred avenue for resolving such claims.[18]

That is exactly what the Commission did here. No party disputes that MCI "at all times complied with what the Commission . . . said MCI may do." Pet. App. 26a. The Commission recognized that to award AT&T damages would be "manifestly unfair" to MCI. Pet. App. 27a.[19] Having thus decided that AT&T could not obtain the relief it sought from MCI even if the permissive tariffing rule were invalid, the Commission was left with only AT&T's prospective challenge. The court of appeals did not hold that the Commission could not deny AT&T retrospective relief for reasons unrelated to the validity *vel non* of the *Fourth Report and Order*. Thus, the court below did not establish any legal predicate for the conclusion that the Commission could not properly invoke rulemaking to decide the continuing validity of permissive tariffing. Even the panel recognized that, when the agency is acting prospectively, rulemaking is the proper choice. *AT&T v. FCC*, 978 F.2d at 732.

Rather than having to wait for a new rule from the Commission, AT&T obtained its relief from the court of appeals itself. The justification for the panel's decision to

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[18] An agency that "adjudicated" a complaint, but implemented a solely prospective remedy would run afoul of this Court's *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("adjudication [can] *not* be purely prospective") (emphasis in original); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) (plurality opinion).

[19] The Commission also expressed concern about the effect of an adjudication on those carriers who were not a party to the case. *See also Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3d Cir. 1974) (explaining why rulemaking is preferable because it permits broad participation and the creation of integrated regulatory plans); *National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 682 (D.C. Cir. 1973) ("reliance on adjudication alone for industry-wide changes may be unfair"). The Commission's concern has proven justified. AT&T has already sued two other carriers for damages, based wholly on the D.C. Circuit opinion in this case.

reach out and decide the merits is clear from even a cursory reading of its opinion. The panel believed that the Commission's position was "plainly engendered by a desire to keep the rule in effect as long as possible" by evading judicial review. Pet. App. 12a; *see also* Pet. App. 8a (stating that the Commission "fear[ed]" subjecting the *Fourth Report* to judicial scrutiny); Pet. App. 13a (noting the Commission's "desire to protect" the *Fourth Report and Order*). The panel further accused the Commission of playing an "administrative law shell game." Pet. App. 13a. The "shell game," however, was nothing more than the decision to proceed by rulemaking, rather than by adjudication, which, as demonstrated, was an entirely appropriate exercise of discretion.

If the Commission was recalcitrant, the court of appeals had appropriate means to deal with the problem, such as a writ of mandamus or a ruling pursuant to the Administrative Procedure Act to compel agency action unlawfully withheld or unreasonably delayed. 5 U.S.C. § 706(1).[20] The apparent frustration of the appeals panel led it, however, to forsake these appropriate tools of judicial oversight and to pronounce an unprecedented requirement that agencies *must* adjudicate claims whenever a complaining party alleges harm resulting from an 'unlawful" agency rule or policy.

The principle established by the court of appeals will have particularly pernicious consequences for agencies like the Commission which provide for private complaint proceedings. In effect, the court of appeals has opened the door to an unending series of challenges to FCC rules and policies in the guise of complaints for individual relief.

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[20] As the record demonstrates, however, the Commission made a good faith effort to reach a decision on the validity of permissive tariffing; its permissive tariffing rulemaking was completed prior to the date the panel released its opinion, although the Commission did not publish the *November 25 Report and Order* until a few days later.

The complaint proceeding format is particularly ill-suited to resolve such issues. The strict time limits Congress imposed on such proceedings, 47 U.S.C. § 208(b)(1), preclude adequate consideration of issues of the breadth presented in AT&T's complaint. And the adjudicatory format is simply not appropriate for resolution of the broad policy questions such claims inevitably raise.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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April 21, 1993

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 22, 1992

Decided November 13, 1992

No. 92-1053

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,
Respondents

US SPRINT COMMUNICATIONS COMPANY,
US WEST COMMUNICATIONS, INC.,
AMERITECH OPERATING COMPANIES,
MCI TELECOMMUNICATIONS CORPORATION,
INTERNATIONAL BUSINESS MACHINES CORPORATION,
AD HOC TELECOMMUNICATIONS USERS COMMITTEE,
Intervenors

Petition for Review of an Order of the
Federal Communications Commission

David W. Carpenter, with whom *Peter D. Keisler*, *Francine J. Berry*, and *Mark C. Rosenblum* were on the brief, for petitioner.

John E. Ingle, Deputy Associate General Counsel, Federal Communications Commission, with whom *Robert L. Pettit*, General Counsel, Federal Communications Commission, *Laurence N. Bourne*, Counsel, Federal Communi-

cations Commission, *Catherine G. O'Sullivan* and *Robert J. Wiggers*, Attorneys, Department of Justice, were on the brief, for respondents.

Frank W. Krogh, Donald J. Elardo, Loretta J. Garcia, and *Richard M. Singer* were on the brief for intervenor MCI Telecommunications Corporation.

James S. Blaszak and *Patrick J. Whittle* were on the brief for intervenor Ad Hoc Telecommunications Users Committee.

Leon M. Kestenbaum, H. Richard Juhnke, and *Michael B. Fingerhut* entered appearances for intervenor US Sprint Communications Company.

Robert B. McKenna and *Lawrence E. Sarjeant* entered appearance for intervenor US WEST Communications, Inc.

Alfred Winchell Whittaker and *Floyd S. Keene* entered appearances for intervenor Ameritech Operating Companies.

J. Roger Wollenberg, William T. Lake and *Jonathan Jacob Nadler* entered appearances for intervenor International Business Machines Corporation.

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: AT&T petitions for review of an order of the Federal Communications Commission that concluded an investigation into a complaint filed by AT&T in 1989. The complaint alleged that MCI had violated and was continuing to violate section 203 of the Communications Act, 47 U.S.C. § 203 (1988), by charging some customers rates that were not filed with the FCC. The Commission denied AT&T's complaint in part and dismissed it in part without determining whether MCI had

violated the Act and ostensibly without addressing the validity of the Commission's *Fourth Report and Order*, 95 F.C.C.2d 554 (1983), on which MCI had relied to justify its actions. The FCC said that it would postpone reconsideration of the validity of the *Report* to a rulemaking that it announced at the same time it denied AT&T relief. We hold that it was arbitrary and capricious for the agency to dismiss AT&T's complaint for immediate relief without deciding the question of law it presented. Moreover, we think that in dismissing the complaint the FCC necessarily, if implicitly, assumed the validity of the *Fourth Report* as a substantive rule. And under our precedent the rule is plainly contrary to section 203. We remand to the Commission for it to reconsider the appropriate relief it should grant to AT&T.

I.

Section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988), requires that every communications common carrier file its rates with the FCC.[1] AT&T's dispute with MCI and the FCC involves "permissive detariffing," a term used to refer to the FCC's decision to forbear from enforcing the rate filing requirements of section 203 against carriers, including MCI, that the FCC determined to be nondominant in the inter-exchange market (presumably AT&T remains the only "dominant" carrier in the FCC's view).[2] Permissive detariffing's genesis

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[1] 47 U.S.C. § 203(a) states: "Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate . . . communication. . . ."

47 U.S.C. 203(b)(2) states:

> The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions. . . .

[2] In its *First Report and Order*, 85 F.C.C.2d 1 (1980), the Commission determined that among interexchange telephone carriers,

is found in the *Competitive Carrier* proceeding the FCC initiated in 1979 to determine methods for reducing the regulatory burdens on communications common carriers. *See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking,* 77 F.C.C.2d 308 (1979). In 1982 in its *Second Report and Order,* the Commission decided that it would forbear from enforcing section 203(a)'s filing requirements against nondominant resale carriers. *See Second Report and Order,* 91 F.C.C.2d 59, 71 (1982). And in its 1983 *Fourth Report and Order,* the Commission extended the policy of forbearance (in other words, permissive detariffing treatment) to "specialized carriers" such as MCI. *See Fourth Report and Order,* 95 F.C.C.2d 554, 578 (1983).

The Commission, however, went beyond mere forbearance in 1985 in its *Sixth Report and Order,* 99 F.C.C.2d 1020 (1985), by making detariffing mandatory and by telling non-dominant carriers that it would no longer even accept their rate filings under section 203. For reasons not apparent, MCI, an apparent beneficiary of the *Sixth Report,* challenged that order in this court on the grounds that the FCC had no authority to eliminate a requirement of the Communications Act. *See MCI Telecommunications Corp. v. FCC,* 765 F.2d 1186 (D.C. Cir. 1985) (*"MCI v. FCC"*). We vacated the *Sixth Report* after concluding that it exceeded the Commission's statutory authority. We explicitly did not decide the validity of the earlier *Fourth Report and Order,* but our decision not to do so was predicated on the assumption that the *Fourth Report* was (at least arguably) immune from review under *Heckler v. Chaney,* 470 U.S. 821 (1985), as an exercise of enforcement discretion. *See MCI v. FCC,* 765 F.2d at 1190 n.4.

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only AT&T exerted market power and was thus dominant. *See id.* at 22-24, 27-30.

The Commission, in subsequent litigation, did not help to clarify the nature of the *Fourth Report*. In 1985 the FCC argued that the *Fourth Report* could be "fairly characterized" as an exercise of the agency's enforcement discretion and that it was thus immune from review. Respondent's Brief at 27, *MCI Telecommunications Corp. v. FCC*, 799 F.2d 773 (D.C. Cir. 1984) (No. 84-1402) (Memorandum Order). In the same brief, however, the Commission referred to the *Second* and *Fourth Reports* as rules designed to "exempt" some carriers from the filing requirements of the Act. *Id.* at 29.

In August 1989, with the FCC's characterization of the *Fourth Report* apparently still uncertain, AT&T filed a complaint against MCI under section 208 of the Communications Act. Section 208 allows any person injured by a violation of the Act to file a complaint with the Commission, *See* 47 U.S.C. § 208(a) (1988),[3] and requires the Commission to investigate the complaint and

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[3] 47 U.S.C. § 208(a) states:

> Any person, any body politic or municipal organization, or State Commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provision thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. . . . If . . . there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

47 U.S.C. § 206 states:

> In case any common carrier shall do, or cause or permit to be done, any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequences of any such violation of the provisions of this chapter. . . .

issue an order concluding the inquiry within 12 to 15 months. *See id.* § 208(b). AT&T claimed that since 1987, MCI had been violating, and continued to violate, section 203(a) by charging certain customers special negotiated rates that it had not filed with the FCC. AT&T sought both damages and a cease and desist order. According to AT&T, MCI's actions injured AT&T by putting AT&T at a competitive disadvantage. While AT&T had to file all of its rates with the Commission, MCI did not, thus not only making it more difficult for AT&T to match MCI's rates, *cf. Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986), but also enabling MCI and other competitors to entangle AT&T in burdensome proceedings before the Commission by filing oppositions to the rates AT&T filed.

MCI, in response, did not deny AT&T's factual allegations. It relied on the *Fourth Report*. According to MCI, the *Fourth Report* was a substantive rule that removed the nondominant carriers' obligation to file all of their rates under section 203(a). AT&T contended, in accordance with our tentative understanding, that the *Fourth Report* had been merely a statement of the FCC's enforcement policy and therefore MCI still had an independent obligation imposed by statute to file all of its rates. If the *Fourth Report* were a substantive rule that purported to remove obligations imposed by the statute, AT&T argued, it was invalid under our *MCI v. FCC* opinion because it exceeded the FCC's statutory authority.

Despite section 208's requirement that the Commission issue an order concluding its investigation into a complaint within 12 months, *see* 47 U.S.C. § 208(b)(1), AT&T's complaint went unresolved for a good deal longer. The FCC first determined that the complaint raised a broad issue of policy and should be transferred to its policy division. Thereafter, a decision on the complaint was further postponed pending the conclusion of the Commission's rulemaking on *Competition in the Interstate Interexchange Marketplace*. *See Report and Order*, 6 F.C.C.

Rcd. 5880 (1991). Finally, in October 1991, 25 months after the complaint had been filed, AT&T petitioned this court for a *writ of mandamus* ordering the Commission to issue a cease and desist order against MCI. We dismissed the petition in January 1992 when the FCC announced that it would issue an order concluding its investigation by January 30, 1992.

On January 28, 1992, the FCC concluded its inquiry but nevertheless declined to decide forthrightly the issue before it. *See AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 807 (1992). Although the Commission, dispelling prior confusion, determined conclusively that the *Fourth Report and Order* was a substantive rule upon which MCI had properly relied, *see id.* at 809, it purported not to consider whether the *Fourth Report*, so interpreted, was valid under the Communications Act. Instead, the Commission said the *Fourth Report*'s "validity" would be better considered in a rulemaking that would afford all interested parties an opportunity to comment. *Id.* And the Commission announced such a rulemaking on the same day it issued the order concluding the investigation. *See Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking*, 7 F.C.C. Rcd. 804 (1992). The Commission thus asserts that it dismissed AT&T's claim for a cease and desist order without ever determining whether MCI was violating the Communications Act. Nevertheless, the Commission rejected AT&T's claim for damages because it determined that MCI was entitled to rely on the *Fourth Report* as a substantive rule that removed MCI's obligation to file all its rates. *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. at 809. The FCC reasoned that even if the rule were declared invalid under the Communications Act, the consequence of that invalidity (whatever it may be) should not apply retroactively to MCI's past conduct. *Id.*

II.

A.

It is rather apparent that, because the Commission fears the *Fourth Report* cannot withstand judicial scrutiny (at least in our court), it wants to avoid judicial review of the rule. This will allow the *Fourth Report* to continue to govern the conduct of carriers for as long as possible. The Commission relies on *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), for the general proposition that "the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *Id.* at 203 (citation omitted). The maxim of administrative law permits an agency to develop a body of regulatory law and policy either through case-by-case decisionmaking (a quasi-adjudicative process) or through rulemaking (a quasi-legislative process). The Commission claims that it merely exercised a choice between these methods by dismissing AT&T's complaint *without ruling on the merits*,[4] and that it then put on its quasi-legislative hat to reconsider the *Report* in a new rulemaking. The difficulty with the Commission's approach—a sort of administrative law shell game—is that it is a logical *non sequitur* to AT&T's complaint. AT&T's complaint asserts that MCI is acting illegally *under present law*, that MCI has violated the law in the past, and that AT&T is and has been injured by MCI's behavior. AT&T did not, as it can do under the Administrative Procedure Act (APA), request a new rulemaking. *See* 5 U.S.C. § 553(e). When presented with AT&T's complaint, the Commission had an obligation to answer the questions it raised and to decide whether MCI had violated the statute.

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[4] Whether it was possible analytically for the FCC to dismiss AT&T's complaint without *implicitly* ruling on the claim is another question. As we discuss below in Part III, we think that by dismissing the complaint the Commission necessarily sanctioned MCI's conduct under the statute.

The agency's responsibilities as an adjudicator are especially clear under the Communications Act. Section 206-208 of the Act give AT&T the right to press a claim for damages suffered due to violation of the Act either in federal court or before the Commission. *See* 47 U.S.C. §§ 206-208. The statute thus expressly sets up the Commission as an adjudicator of private rights.[5] The question before the Commission as the adjudicator was whether or not MCI had been, and currently was, violating the law. If it was, at a minimum (putting aside the question of whether AT&T has a right to damages) AT&T was entitled to a cease and desist order at that point. The FCC's proposal to consider the general problem AT&T raises in a future rulemaking--a process designed to consider whether to issue new normative standards—is, when one thinks hard about it, a non-response to the complaint. It is similar to a judge who dismisses a complaint based on a federal statute because he has been informed that Congress is conducting hearings on whether to change the statute. Like the judge, the agency has an obligation to decide the complaint under the law currently applicable. *Cf. Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987), *cert. denied*, 493 U.S. 1019 (1990).

Agencies do have a fundamental choice whether to interpret and apply federal statutes through adjudication or through rulemaking But they cannot avoid their responsibilities in an adjudication properly before them by looking to a rulemaking, which operates only prospectively. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The choice an agency has between different methods of "making law" is simply irrelevant when the agency is called upon as an adjudicator to apply existing law to a complaint. Here, as in *Meredith*,

[5] Presumably, AT&T chose to bring its case before the Commission because AT&T is primarily interested in a cease and desist order. The statute does not explicitly grant the district court power to issue such an order, but the parties and intervenors all assume that the Commission could grant such relief.

the Commission "confuses its quasi-judicial role with its quasi-legislative one." *Meredith*, 809 F.2d at 873.

The Commission claims that a two-party adjudication would not have been suitable to consider the validity of the *Fourth Report* because so many carriers in the industry have an interest in the question. We do not think the FCC had any alternative but to confront the issue. However, it easily could have solicited the views of other carriers. The FCC was quite free to invite them to intervene or file briefs as non-parties. *See General Amer. Transp. Corp. v. ICC*, 883 F.2d 1029, 1030 (D.C. Cir. 1989) (Silberman, J., concurring in denial of rehearing). Indeed, nothing stopped the FCC from initiating a companion rulemaking when AT&T filed its complaint—as long as the Commission concluded its inquiry into AT&T's complaint within the 12 to 15 month period required by section 208 of the Act. Nor are we impressed with the FCC's argument that section 208 authorized the Commission's action by giving the agency authority to investigate complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208(a). A future rulemaking that will consider modifying the *Fourth Report* is in no sense an investigation of AT&T's complaint. It could not possibly be, because a rulemaking can affect the conduct of parties only *prospectively*; it does not determine the legality of past conduct. AT&T, it must be understood, challenged MCI's *past* and present actions. A cease and desist order, to be sure, can be thought to provide prospective *relief*, but it must be based on the premise that existing law has been violated.

The Commission's more interesting argument is that it could not "consider" AT&T's challenge to the legality of the *Fourth Report* because it could not disregard its own rule in an adjudication. *See American Fed'n of Gov't Employees v. FLRA*, 777 F.2d 751 (D.C. Cir. 1985). We have never held, however, that an agency is obliged to apply a rule in an adjudicatory context if intervening events indicate that the rule is unlawful. Our opinion in

Meredith points in the other direction. There we concluded that the FCC was obliged to entertain petitioner's claim that the FCC's Fairness Doctrine was unconstitutional, whether or not the FCC changed its policy in a new rulemaking. *See Meredith*, 809 F.2d at 873-74. Similarly, then Judge Scalia, concurring in *American Federation of Government Employees*, recognized that in some situations, when an agency declines to apply its own rule in an adjudication "we would be justified [on appeal] in looking beyond the defect of inconsistency, to affirm an adjudication on the ground that its result was mandated by statute and that the conflicting rule was simply unlawful." *American Fed'n of Gov't Employees*, 777 F.2d at 760 (Scalia, J., concurring). Judge Scalia's concern for situations only dimly perceived in that case seems very much on the mark, for otherwise an agency would be required to apply a rule in an adjudication until it had revoked the rule in a new rulemaking, even if the Supreme Court had invalidated the interpretation upon which the rule was based.

In any event, the Commission's stated concern seems to us to be a red herring. If the agency believed its rule was invalid and did not want to so hold in an adjudication, as we mentioned above, it immediately could have started a companion rulemaking to repeal the rule. The agency's own lawyers could have determined the rule was inconsistent with the statute and a Notice of Proposed Rulemaking would then have so stated.[6] The rule then simply could have been revoked and perhaps a new rule could have been adopted. But surely the agency was not required to apply the invalid rule in the meantime.

Typically, of course, when an agency's rule is challenged in an adjudication as inconsistent with the agency's authorizing statute, the agency rejects the challenge on the merits and the supposed concerns the FCC expresses

[6] Here, of course, the agency also had the benefit of the parties' briefs.

here are never voiced. The agency applies its rule because it believes the rule is lawful, and the agency is prepared to stand by it forthrightly in a subsequent appeal. The FCC's unusual position here is plainly engendered by a desire to keep the rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review. The Commission thought to achieve this goal by dismissing the complaint, thereby maintaining the legal regime created by the rule. Yet, it sought to do so without squarely relying on the rule to justify the dismissal. In that way, the Commission hoped to avoid judicial review. We have little difficulty in concluding that it was arbitrary and capricious for the Commission to dismiss AT&T's complaint with only a promise to address the legal issue it raised in a future rulemaking. To the extent that the Commission thought it had discretion to postpone decision to a rulemaking, it misunderstood its role as an adjudicator.

B.

The Commission, not surprisingly in light of its obvious strategy, insists that even if we conclude, as we do, that the agency's dismissal of AT&T's complaint violated the law, we should not reach the validity of the *Fourth Report*. According to the Commission, the order below did not apply the *Fourth Report* or consider its validity and, indeed, did not even determine the lawfulness of MCI's conduct. Thus, we are told we must remand the case to the agency, so that the Commission can determine the validity of the rule in the adjudication.

We are quite aware that to accept the Commission's argument would be to allow the FCC's troubling tactics largely to succeed. The FCC, it will be recalled, did not decide AT&T's complaint within the statutory time period. It was only after AT&T brought a *mandamus* petition before us 25 months after the complaint had been filed that the FCC agreed to issue its decision. To remand the case now for the FCC to "consider" the validity of the *Fourth Report* would simply permit the FCC to delay the

process further. Moreover, a remand seems especially unnecessary in light of our prior opinion in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), which, as we discuss below, virtually settles the issue in this court.

Still, we need not rely on these factors to conclude that the *Fourth Report* is properly before us. It is well established that a rule may be reviewed when it is applied in an adjudication—an agency need not explicitly reassess the validity of a rule to subject the rule to challenge on review. *See NLRB Union v. FLRA*, 834 F.2d 191, 195 (D.C. Cir. 1987); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).[7] Despite the Commission's protestations to the contrary, we think the Commission necessarily relied on the *Fourth Report* in its decision to dismiss AT&T's complaint.

The *Report*, and the Commission's desire to protect it, clearly provided the underlying rationale for the order under review. The Commission explicitly justified its decision to dismiss on the grounds that the complaint challenged "the Commission's previously adopted and effective forbearance rule. *AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 801, 809 (1992). And, in denying AT&T retrospective relief,

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[7] A simple citation to these cases also suffices to dispense with the FCC's claim that AT&T's challenge to the *Fourth Report* was not timely because it was not filed when the *Report* was first issued. The FCC's argument that the complaint was not timely seems particularly meritless in this case because it was not until the FCC issued the very order under review here that it was clear that the *Fourth Report* was a substantive rule that altered carriers' obligations under the statute. In any event, the contention that AT&T's challenge was not timely, or, as the Commission now argues, that it is barred by the doctrine of laches, cannot justify the Commission's decision since neither reason was cited by the Commission in its original order. *See SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

the Commission relied on its conclusion that the *Fourth Report* was a substantive rule that removed the obligation of carriers to file tariffs. *Id.* The FCC's only reason for clarifying its review of the *Report* was to provide MCI and other carriers with a regulatory sanction for their behavior. As the Commission concluded: "It would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, *which the Commission explicitly approved in advance,* may give rise to a finding of liability." *Id.* (emphasis added).

Whatever tortured language the Commission used to describe its actions,[8] the decision to dismiss AT&T's complaint necessarily must have rested on the *Fourth Report* and placed an implicit imprimatur on the *Fourth Report*'s interpretation of the statute. The notion the FCC advances before us—that it did not apply the *Report* and did not determine whether or not MCI had violated the statute—suggests that its order merely left the parties in legal limbo. But the Commission ignores the practical effect of its order. In dismissing the complaint, the Commission rejected AT&T's request for relief and definitively sanctioned MCI's conduct. There is no conceivable basis for the agency's action other than a temporary reliance on the *Fourth Report's interpretation of the statute* as a valid statement of the law, at least for the interim period between the time of the dismissal and the conclusion of the new rulemaking. Notwithstanding its claims for dis-

[8] The Commission claimed that it could dispose of AT&T's claim for "prospective relief" (a cease and desist order) because, although "nominally stated in terms of a request for relief against MCI, [it] is in practical effect a challenge to the Commission's previously adopted and effective forbearance rule." *See AT&T Communications v. MCI Telecommunications Corp.*, 7 F.C.C. Rcd. 807, 809 (1992). That is, of course, true, but it hardly justifies the Commission's ostensible refusal to consider the validity of the rule. Whether the relief to be considered is damages or a cease and desist order, the question before the Commission is whether MCI has been and is violating the law.

cretion to proceed either by rulemaking or by adjudication, the Commission does not, and could not, claim that pending a new rulemaking it has authority to decide complaints contrary to the law. Once the Commission's necessary reasoning is recognized, the Commission's sophistic claim that it did not apply the *Report* or pass on its validity evaporates.

Finally, we see no need to remand to obtain an agency interpretation of the statute.[9] The Commission, of course, set forth its statutory construction when it promulgated the rule. When a rule is challenged in its application, courts typically examine the validity of the rule on the basis of the reasoning offered when the rule was originally promulgated. *See, e.g., National Ass'n of Greeting Card Publishers v. United States Postal Serv.*, 607 F.2d 392, 425 n.59 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1025 (1980); *Network Project v. FCC*, 511 F.2d 786, 789 n.1 (D.C. Cir. 1975). And, in any event, the agency has already defended (unsuccessfully) in *MCI v. FCC* the very statutory interpretation that underpins the *Fourth Report*. Accordingly, we pass on to the merits.

III.

It is unnecessary to consider any more whether the *Fourth Report* is merely an enforcement policy. The Commission has determined unequivocally that it is a substantive rule[10] designed to affect not only the FCC's enforcement policies, but also the relationships and rights of the "dominant" carrier, AT&T, and all other carriers.

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[9] We would normally be obliged to follow this course if the statutory language were ambiguous.

[10] The language of the *Report* amply justifies the Commission's reading. The *Report* begins by proposing "to remove . . . regulatory requirements for non-dominant carriers," *Fourth Report and Order*, 95 F.C.C.2d 554, 555 (1983), and concludes by giving carriers, subject to the order, "permission to cancel their tariffs on file with this Commission," *id.* at 582.

As a substantive rule, the *Fourth Report* is simply not defensible in this court. Its validity hinges on the interpretation of section 203 of the Communications Act. Section 203(a) states that "every" carrier "shall" file its tariffs with the Commission. 47 U.S.C. § 203(a). We said in *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), "Shall . . . is the language of command.' " *Id.* at 1191 (quoting *Escoe v. Zerbst*, 295 U.S. 490, 493 (1935)). The Commission points out (as it did in *MCI*) that section 203(b) allows the Commission to "modify any requirement" of the section "in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203 (b)(2). According to the FCC, that language allows the Commission to remove the filing obligation from certain carriers as long as it continues to enforce the substantive requirements of sections 201 and 202—namely that rates be just, reasonable, and nondiscriminatory. *See* 47 U.S.C. §§ 201-202. Although the argument was not insubstantial when made initially, we concluded that the language of the statute was not susceptible to the Commission's reading.[11]

In *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985), as noted above, we concluded that section 203(b) could not be interpreted to permit the Commission's attempt to *require* nondominant carriers to stop filing tariffs under section 203(a). We struck down the mandatory detariffing rule contained in the Commission's *Sixth Report and Order*. *See MCI*, 765 F.2d at 1195-96. To be sure, we explicitly reserved holding on the permissive detariffing scheme of the *Fourth Report*, but only because we believed the *Report* "arguably immune from judicial review" as a simple statement of enforcement policy. *Id.* at 1190 n.4. Our reasoning in

[11] Our opinion, although it does not cite *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), postdates that case.

MCI forecloses the Commission's argument in this case. We said in *MCI* that the language of section 203(b) "suggest[s] circumscribed alterations—not, as the FCC now would have it, wholesale abandonment or elimination of a requirement." *Id.* at 1192. To "modify," we thought, suggests to "alter; to change in incidental or subordinate features." *Id.* (quoting BLACK'S LAW DICTIONARY 905 (5th ed. 1979)). Whether detariffing is made mandatory, as in the *Sixth Report*, or simply permissive, as in the *Fourth Report*, carriers are, in either event, relieved of the obligations to file tariffs under section 203(a). That step exceeds the limited authority granted the Commission in section 203(b) to "modify" requirements of the Act.[12]

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[12] As we discussed in *MCI*, the Second Circuit's interpretation of section 203(b) is similarly restricted. *See id.* at 1192 (citing *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); and *American Tel. & Tel. Co. v. FCC*, 487 F.2d 865 (2d Cir. 1973)).

As AT&T points out, our opinion in *MCI* is somewhat buttressed by the more recent Supreme Court case, *Maislin Industries, U.S. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). There, the Court rejected the ICC's "deregulatory" interpretation of the quite similar rate-filing provisions of the Interstate Commerce Act, 49 U.S.C. §§ 10761-10762 (1988), which share a common ancestor with the Communications Act, the original Interstate Commerce Act. Due to this shared lineage, an interpretation of one of the modern statutes is often thought instructive in judicial construction of the other. *See MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990); *American Broadcasting Cos. v. FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T v. FCC*, 487 F.2d at 873-74. In *Maislin*, a carrier had negotiated a rate with a shipper that was below the carrier's filed rate. When the carrier tried to collect the filed rate rather than the negotiated rate, the ICC, under its Negotiated Rate Policy, rejected the carrier's claim. The Supreme Court, however, disapproved the ICC's interpretation of the Act. "[B]y sanctioning adherence to unfiled rates," the Court said, the ICC had "undermine[d] the basic structure of the Act." *Maislin*, 497 U.S. at 132. The Court concluded that compliance with the filing requirements was " 'utterly central' to the administration of the Act," *id.* (quoting

We understand fully why the Commission wants the flexibility to apply the tariff provisions of the Communications Act to AT&T, which the Commission regards as the dominant carrier, differently from the way it applies the tariff provision to other competing carriers. We do not quarrel with the Commission's policy objectives. But the statute, as we have interpreted it, is not open to the Commission's construction. The Commission will have to obtain congressional sanction for its desired policy course.

IV.

There remains AT&T's claim for damages. The Commission, as part of its strategy to avoid judicial review of the *Fourth Report*, disposed of this claim by concluding that, assuming, *arguendo*, the *Fourth Report* was contrary to law, AT&T would still not be entitled to damages because any such determination of law should not be applied "retroactively." In other words, *MCI* was entitled to rely on the Commission's interpretation of the statute embodied in the *Fourth Report*. The Commission applied the five factor test we have used to determine whether new law developed by an agency in adjudication should be applied retroactively, *see Retail, Wholesale & Dep't Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *see also Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 913 (1988), and decided the answer to the hypothetical question in this case was no. AT&T claims that, in light of our *MCI* decision, an explicit Commission recognition that its *Fourth Report* is *ultra vires* is no real change in the law.

Regular Common Carrier Conference v. United States, 793 F.2d 376, 379 (D.C. Cir. 1986)) and that the obligation to charge only filed rates had "always been considered essential to preventing price discrimination," *id.* at 126. Despite the harsh result for a shipper who had negotiated a lower rate, the Court thought the ICC must adhere to the "filed rate doctrine" that requires carriers to charge, and shippers to pay, *only* the rate filed with the ICC.

We do not think it appropriate to resolve this dispute and apply the five factor test at this stage because we do not fully understand what the Commission sees as "the law" to be applied retroactively. By implication, the Commission must be referring to a prospective change in its regulation, but we think it is analytically incoherent to consider whether that change should be applied retroactively until it is fashioned. If the Commission means, instead, only its acceptance of our *MCI* interpretation, it would have to explain why that is a change in the law. The Commission may be relying on its right to refuse to acquiesce in one (or more) court of appeals' interpretation of its statute, but, then, how does it explain the interrelationship between a party's possible cause of action in the district court and one before the Commission? Would parties be entitled to damages in the United States District Court for the District of Columbia (particularly in light of our *MCI* opinion), but not before the Commission?

* * * *

We remand the case to the Commission, having vacated the *Fourth Report* as contrary to the Communications Act, with instructions to reconsider AT&T's claim for relief. It would appear that AT&T is entitled promptly to a cease and desist order against MCI. We do not direct the Commission to provide specific relief, however, partly out of a reluctance to direct an agency as to the exact remedy to be employed and partly because of our expectation that the practices sanctioned by the *Fourth Report* will cease since carriers who do not file tariffs will be subject to damage suits in our district court. The Commission will also have to reconsider AT&T's damages claim. If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.

It is so ordered.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

File No. CE-89-297

IN THE MATTER OF AT&T COMMUNICATIONS,
Complainant,

v.

MCI TELECOMMUNICATIONS CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: January 24, 1992 Released: January 28, 1992

By the Commission:

I. INTRODUCTION

1. On August 7, 1989, AT&T Communications filed the above-captioned formal complaint with this Commission pursuant to sections 206 and 208 of the Communications Act [1] and Sections 1.721 *et seq.* of the Commission's Rules.[2] AT&T alleges that MCI Telecommunications Corporation provides common carrier telecommunications services to several customers at rates, and on terms and conditions, that are not filed or contained in interstate tariffs, in violation of section 203 of the Communications Act.[3]

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[1] 47 U.S.C. §§ 206 and 208.

[2] 47 C.F.R. § 1.721 *et seq.*

[3] 47 U.S.C. § 203. Section 203(a) provides that "[e]very common carrier . . . shall, within such reasonable time as the Commission

2. Pursuant to our authority under section 208 of the Act, we deny AT&T's complaint in part and dismiss it in part. It would be manifestly unfair to impose liability on MCI for past conduct which the Commission has explicitly authorized. Moreover, the complaint calls into question the prospective lawfulness of longstanding rules that play a fundamental role in our regulation of the interstate marketplace. Any decision relative to those rules could have a profound effect on a broad range of consumers and providers of telecommunications services. This decision should not be made in an adjudicatory proceeding between two parties.

3. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.[4]

II. BACKGROUND

4. In 1979, the Commission initiated the *Competitive Carrier* rulemaking proceeding in order to consider amendment of the tariff filing requirements for competitive common carriers, as well as other rule changes relat-

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shall designate, file with the Commission and print and keep open for public inspection, schedules showing all charges for itself . . . and showing the classifications, practices and regulations affecting such charges." Section 203(c) provides that "[n]o carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act . . . and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation, for such communication, or for any service in connection therewith . . ."

[4] *See* Tariff Filing Requirements for Interstate Common Carriers, Notice of Proposed Rulemaking, CC Docket No. 92-13, FCC 92-35, adopted January 24, 1992.

ing to facilities and services authorizations.[5] In the *Second Report and Order*, adopted in 1982, the Commission concluded that nondominant telecommunications common carriers—defined as those carriers without market power —lacked both the incentive and ability rationally to charge rates that would violate the Communications Act's substantive requirements that rates be just and reasonable and not unreasonably discriminatory.[6] For such carriers, the Commission concluded that tariff filing requirements tended to "inhibi[t] price competition, service innovation and the ability of firms to respond quickly to market trends," [7] and therefore were inconsistent with the Act's broader mandate "to make available . . . to all people of the United States a rapid, efficient Nation-wide and world-wide wire and radio communication service with adequate facilities at reasonable charges." [8] Accordingly, the Commission adopted its previous tentative conclusion that, in these circumstances, section 203 of the Act did not mandate the filing of tariffs by nondominant carriers.[9]

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[5] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308, 309 (1979).

[6] *See* 47 U.S.C. §§ 201(b), 202(a).

[7] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Second Report and Order, 91 FCC 2d 59, 65 (1982).

[8] *Id.* at 64, *quoting*, 47 U.S.C. § 151.

[9] *Id.* at 71, *citing*, Policy and Rules Concerning Rates for Competitive Carrier Services and Facilities Authorizations Therefor, Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 479, 484 (1981). The Commission concluded that the statute's substantive standards could be enforced most effectively against nondominant carriers through the complaint procedures specified in section 208 of the Act, rather than through tariff investigations. Second Report and Order, 91 FCC 2d at 70-71. As we state in note 26, *infra*, we do not consider AT&T's complaint an attempt to enforce the substantive provisions of the statute. AT&T, in this case, is using the complaint process in order to attempt to change a long-standing Commission rule.

5. Taking a cautious, incremental approach, the Commission limited the scope of the initial forbearance rule to resale carriers, ordering that such carriers "no longer need adhere to . . . the tariff filing requirements of section 203," although they were free to continue to file tariffs if they so chose.[10] One year later, in the *Fourth Report and Order*, the Commission extended forbearance to all nondominant interexchange carriers (IXCs) including so-called "specialized carriers" such as MCI.[11]

6. Neither AT&T nor any other participant in the *Competitive Carrier* proceeding sought judicial review of the Commission's decision to forbear from tariff regulation of nondominant carriers. The Commission to date has not reconsidered those policies and rules, and no court has reviewed them.[12] Today there are in excess of four hundred nondominant IXCs that offer common carrier services.[13] Few, if any, of these carriers file tariffs

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[10] *Id.*, at 73.

[11] Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fourth Report and Order, 95 FCC 2d 554 (1983). The Commission also expanded the class of nondominant IXCs to include miscellaneous common carriers, domestic satellite carriers (domsats), domsat resellers, domestic operations of Western Union, international record carriers, other record carriers, and interexchange carriers affiliated with exchange telephone companies. *Id.* 95 FCC 2d at 557.

[12] Later in the *Competitive Carrier* proceeding, the Commission adopted rules which compelled nondominant carriers to cancel their existing tariffs and prohibited failure tariff filings. Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Sixth Report and Order, 99 FCC 2d 1020 (1985). Mandatory forbearance, as it was called, was overturned after judicial review. *See* MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985) (hereinafter "MCI v. FCC"). The court in that case, however, explicitly "d[id] not reach the question whether the FCC's earlier permissive orders are invalid." *Id.* at 1190-1191, n.4.

[13] Summary of Long Distance Carriers, Industry Analysis Division, FCC, November 22, 1991, Table 1.

for all their service offerings, and most do not file any tariffs at all.

A. *The Complaint*

7. AT&T's complaint alleges that MCI provides interstate telecommunications services to large business customers, at rates and on terms and conditions that are not filed or contained in MCI tariffs.[14] According to AT&T, MCI's actions violate section 203 of the Communications Act.

8. AT&T argues that MCI is not relieved of its obligation to file tariffs by its classification as a nondominant carrier under the Commission's *Competitive Carrier* rules. In support of its position, AT&T cites *MCI v. FCC*, which, it claims, held that the tariffing provisions of Section 203 are mandatory, and may not be lifted as to any carrier.[15] AT&T also cites a 1990 Supreme Court decision, *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, which AT&T claims, confirms that MCI's conduct violates section 203.[16]

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[14] Specifically, AT&T alleges that MCI provides off-tariff service to Merrill Lynch, the Westin Hotel Company, United Airlines, the Department of Defense, the University of Colorado at Boulder, and Uniguard Security Insurance Program. AT&T Complaint at 7-10.

[15] AT&T Complaint at 3, *citing*, MCI v. AT&T, 765 F.2d at 1188, 1192-93.

[16] Motion of American Telephone and Telegraph Company for Summary Decision at 7-11, *citing*, Maislin Industries, U.S., Inc. v. Primary Steel, Inc., —— U.S. ——, 110 S.Ct. 2759 (1990) (hereinafter "Maislin"). In March 1990, we initiated a comprehensive examination of the state of competition in the long-distance marketplace with a view toward relaxing some of our regulatory controls over AT&T. Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627 (1990). Pending completion of this proceeding, we deferred consideration of AT&T's complaint. The Commission recently adopted rules in that proceeding. Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991), *recon. pending*.

B. *MCI's Response*

9. MCI admits that it has provided service to the six named customers other than by tariff[17] but argues that AT&T has failed to establish a *prima facie* case against MCI. MCI claims that it has, at all times, abided by the Commission's *Competitive Carrier* rules and that its actions therefore fully complied with the Communications Act as interpreted and applied by the Commission.[18] MCI argues that *MCI v. AT&T* is inapposite to AT&T's complaint since that case only decided that mandatory forbearance was unlawful.[19] Likewise, MCI argues that, since *Maislin* involved a different agency under a different statute involving different factual circumstances, that case has no bearing on the non-tariff arrangements that MCI and other nondominant IXCs have entered into with customers.[20]

10. MCI also argues that AT&T's complaint is fundamentally a petition for reconsideration of the Commission's *Competitive Carrier* rules. It claims, that, as such, the complaint is untimely in violation of Section 405 of the Act and Section 1.106(f) of the Commission's Rules.[21]

11. Finally, MCI argues that AT&T's complaint is not the proper vehicle for modifying the *Competitive Carrier* rules. It states that if the Commission were to decide within the context of the complaint that MCI's failure to

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[17] MCI's Opposition To Motion To Compel at 2.

[18] MCI's Motion to Dismiss at 1-3, 7-9.

[19] MCI's Motion to Dismiss at 6-7, 16-18.

[20] MCI's Opposition to Motion of American Telephone and Telegraph Company for Summary Decision at 4-5.

[21] Section 405 of the Act and Section 1.106(f) of the Commission's Rules establish a 30-day deadline for filing requests for reconsideration of Commission orders. *See* 47 U.S.C. § 405; 47 C.F.R. § 1.106(f).

tariff its service to some customers is a violation of Section 203 of the Act, the Commission would be modifying *Competitive Carrier* without benefit of an appropriate rulemaking. It argues that any reassessment of those policies and rules should involve all parties who are potentially affected by such reassessment.[22]

III. DISCUSSION

12. We now deny AT&T's complaint in part and dismiss it in part.[23] We deny AT&T's complaint insofar as it seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission. That claim directly conflicts with the duly adopted "forbearance" rule upon which MCI was entitled to rely. We dismiss AT&T's complaint insofar as it seeks injunctive relief requiring MCI to file tariffs in the future. AT&T seeks, in effect, the wholesale repeal of that rule, which has governed interexchange competition for the better part of a decade. We find such broad relief to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. By companion order adopted today, we initiate a rulemaking proceeding to reexamine our forbearance rule.[24]

13. We deny AT&T's complaint insofar as it claims that MCI is liable for damages because its practice of providing service off-tariff violates section 203 of the Act. MCI's conduct, in this regard, at all times complied with what the Commission, in the *Fourth Report and Order*, has said MCI may do, *i.e.*, provide interstate telecommunications service at rates and on terms that are not

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[22] MCI's Motion to Dismiss at 13-15.

[23] We note that section 208(a) of the Communications Act requires the Commission to investigate complaints "in such manner and by such means as it shall deem appropriate."

[24] *See* note 4, *supra*.

contained in tariffs on file with the Commission.[25] Contrary to AT&T's claim that the forbearance policy reflects merely an exercise of the Commission's prosecutorial discretion, the *Fourth Report and Order* adopted a binding substantive rule that removed the requirement that nondominant carriers such as MCI file tariffs. Under those circumstances, it would be manifestly unfair to entertain AT&T's claim that MCI's alleged past conduct, which the Commission explicitly approved in advance, may give rise to a finding of liability.[26] Any off-tariff service offerings by MCI have been made pursuant to rules promulgated by the FCC in orders that were not challenged on review and have long since become final. We will not award damages against MCI based simply on allegations made years later that the rules to which MCI conformed its conduct are beyond our authority to adopt.

14. We alse dismiss AT&T's complaint insofar as it seeks prospective relief enjoining MCI from providing off-tariff services. This claim, while nominally stated in terms

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[25] While AT&T asked the Commission in its complaint to investigate whether MCI had violated sections 201(b) and 202(a) of the Communications Act, *see* AT&T Complaint at 12-13, it appears to have disavowed this request and limited its complaint to alleged violations of section 203 of the Act. *See* AT&T Petition for Writ of Mandamus, Case No. 91-1487 (D.C. Cir., filed October 4, 1991), at 2-3; MCI Telecommunications Corp. v. FCC, No. 89-1382, Transcript of Oral Argument held September 11, 1990, at 50-51 (comments of AT&T counsel in petition for review of Commission's Tariff 12 decision).

[26] *Cf.* Arizona Grocery v. Atchison, Topeka and Santa Fe Railway Co., 284 U.S. 370, 389 (1932); Nader v. FCC, 520 F.2d 182, 202-203 (D.C. Cir. 1975) (rates charged consistent with agency prescription protect carrier against subsequent claim that rate was unlawful). *See also* Bowen v. Georgetown University Hospital, —— U.S. ——, 109 S.Ct. 468, 480 (1988) (Scalia, J., concurring) (suggesting that retroactive adjudication may be improper where conflicting "pre-existing interpretive rule construing [statutory] requirements is in effect").

of a request for relief against MCI, is in practical effe a challenge to the Commission's previously adopted an effective forbearance rule.

15. It is well established that agencies have broa discretion in determining whether to make policy vi rulemakings or adjudications. Thus, in *SEC v. Chener* the United States Supreme Court said that "the choic made between proceeding by general rule or by indivi ual, ad hoc litigation is one that lies primarily in the i formed discretion of the administrative agency."[27] Th Court recognized, however, that rulemaking proceedin are more appropriate for considering general rules o widespread applicability.[28]

16. The Commission's forbearance rule was adopte in a notice and comment rulemaking proceeding and ha been in place for almost ten years. This rule represent one of the cornerstones of our regulation of the long distance industry. Any change in this fundamental polic would have a significant impact on a broad range o customers and providers of telecommunications service across the nation. It would be inappropriate for us t consider a modification or repeal of this policy, with s potentially widespread an impact, in the context of a two party adjudicatory proceeding, as opposed to a rulemak ing proceeding. In a rulemaking, all interested partie will have the opportunity to comment. In addition, rulemaking proceeding will permit us to address our for bearance rule as it applies to all nondominant carriers and to consider and implement any changes that we ma make to it on an industry-wide basis.[29] Given the funda

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[27] 332 U.S. 194, 203 (1947).

[28] *Id.* at 202, 203; *see also* American Federation of Governmen Employees v. FLRA, 777 F.2d 751, 759 (D.C. Cir. 1985); Telocato Network of America v. FCC, 691 F.2d 525, 551 (D.C. Cir. 1982)

[29] By contrast, any order that we issue on AT&T's complain would necessarily bind only MCI. *See* NLRB v. Wyman-Gordo

mental importance of these matters, the coordinated and comprehensive approach made possible by a rulemaking will reduce industry uncertainty, while ensuring the smoothest possible transition to any new rules that may be necessary.

IV. CONCLUSION

17. We now deny in part and dismiss in part AT&T's complaint. To the extent that AT&T seeks damages against MCI for its past conduct in offering service at rates and on terms and conditions not contained in tariffs filed with the Commission, AT&T's claim directly conflicts with the duly adopted and effective "forbearance" rule upon which MCI was entitled to rely. To the extent that AT&T seeks injunctive relief requiring MCI to file tariffs in the future, we find such broad relief changing the basic rules governing the long-distance industry to be inappropriate in the context of this adjudicatory proceeding between only two of the industry's numerous participants. The proper procedural vehicle for considering changes in our forbearance rule is a rulemaking proceeding. In a companion order adopted today, we institute such a proceeding so that the issues raised by AT&T may be addressed in an appropriate manner.

V. EX PARTE RULES

18. In light of the interrelationship between this proceeding and the Notice of Proposed Rulemaking we adopt today, to the extent this complaint proceeding re-

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Company, 394 U.S. 759, 763-766 (1969) ("adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein . . . But this is far from saying . . . that commands, decisions or policies announced in adjudication are 'rules' in the sense that they must, without more, be obeyed by the affected public.") At the same time, such an order would have major precedential implications for other nondominant IXCs, and could, depending upon the decision, create considerable uncertainty both as to their regulatory status and the lawfulness of many of their current offerings.

mains pending through a petition for reconsideration or appeal of this order, the proceeding will henceforth be deemed a nonrestricted proceeding under the Commission's *ex parte* rules.[30] Ex parte presentations will be permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission Rules.[31]

VI. ORDERING CLAUSE

19. For the reasons set forth above, pursuant to 47 U.S.C. § 208, IT IS ORDERED THAT AT&T'S above-referenced complaint is DENIED in part and DISMISSED in part.

FEDERAL COMMUNICATIONS COMMISSION

DONNA R. SEARCY
Secretary

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[30] *See* 47 C.F.R. § 1.1200(a).

[31] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1053

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

BEFORE: Wald, Silberman and Sentelle, Circuit Judges

ORDER

[Filed Jan. 21, 1993]

Upon consideration of the Petitions for Rehearing of respondent and intervenor MCI Telecommunications Corporation and of the brief of *amici curiae* in support thereof,

ORDERED, by the Court, that the petitions are denied.

Per Curiam

FOR THE COURT:

/s/ Ron Garvin
RON GARVIN
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1053

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

[Filed Jan. 21, 1993]

The Suggestions For Rehearing *En Banc* of respondent and Intervenor MCI Telecommunications Corporation have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestions are denied.

Per Curiam

FOR THE COURT:

/s/ Ron Garvin
RON GARVIN
Clerk

Circuit Judges Ruth B. Ginsburg and Henderson did not participate in this matter.

APPENDIX E

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

CC Docket No. 92-13

IN THE MATTER OF TARIFF FILING REQUIREMENTS FOR INTERSTATE COMMON CARRIERS

REPORT AND ORDER

Adopted: November 5, 1992

Released: November 25, 1992

By the Commission:

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I. INTRODUCTION

1. In a Notice, released January 28, 1992,[1] the Commission initiated this rulemaking to review the lawfulness and future application of the tariff forbearance rules we adopted nearly a decade ago in *Competitive Carrier*.[2] In particular, we sought comment on whether, in light of intervening court decisions and a challenge to those rules by the American Telephone and Telegraph Company (AT&T), the Commission had authority under the Communications Act of 1934 (Communications Act or the Act) "to continue to permit nondominant carriers not to file tariffs."[3] We also sought comment on regulatory alternatives in the event we determined that our existing tariff forbearance rules were unlawful.[4]

2. In response to the *Notice*, we have received and reviewed comments from more than 40 parties represent-

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[1] *Tariff Filing Requirements for Interstate Common Carriers* (CC Docket No. 92-13), Notice of Proposed Rulemaking, 7 FCC Rcd 804, 57 Fed. Reg. 6487 (1992) (*Notice*).

[2] *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor* (CC Docket No. 79-252) (*Competitive Carrier*), Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979) (*Competitive Carrier Notice*); First Report and Order, 85 FCC 2d 1 (1980) (*First Report*); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981) (*Competitive Carrier Further Notice*); Second Report and Order, 91 FCC 2d 59 (1982) (*Second Report*), *recon.*, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, FCC No. 82-187, 47 Fed. Reg. 17,308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46,791 (1983); Third Report and Order, 48 Fed. Reg. 46,791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983) (*Fourth Report*); Fourth Further Notice of Proposed Rulemaking, 96 FCC 2d 922 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984) (*Fifth Report*), *recon.*, 59 Rad. Reg. 2d (P&F) 543 (1985); Sixth Report and Order, 99 FCC 2d 1020 (1985) (*Sixth Report*), *rev'd MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985) (*MCI v. FCC*).

[3] *Notice*, 7 FCC Rcd at 805, para. 8.

[4] *Id.*

ing virtually every segment of the interstate telecommunications industry, including long distance carriers, local exchange carriers, and telecommunications users.[5] On the basis of this record, we now conclude that our existing tariff forbearance rules are lawful and serve the public interest. Accordingly, we reaffirm our decision in *Competitive Carrier* that domestic carriers classified as "nondominant" and subject to forbearance may, but need not, file interstate tariffs. Consequently, we do not address the additional issues raised in the *Notice*, which were conditioned upon a contrary finding.

II. BACKGROUND

A. *The Competitive Carrier Proceeding*

3. Until the 1960s, AT&T, through its then-subsidiary Bell Operating Companies and in cooperation with some 1600 independent local telephone companies, provided virtually all interstate telephone service. Competitive entry into interstate common carriage began on a small scale in 1969, when the Commission authorized Microwave Communications, Inc. (now MCI) to construct and operate microwave circuits between Chicago and St. Louis for the provision of point-to-point common carrier service.[6] Throughout the 1970s, the Commission expanded in increments the categories of services subject to competitive entry.[7] Following the D.C. Circuit's Execunet decision,[8]

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[5] A list of the parties participtaing in this proceeding is attached hereto as Appendix A.

[6] *Microwave Communications, Inc.*, 18 FCC 2d 953 (1968), *recon.*, 21 FCC 2d 190 (1970).

[7] *See, e.g., Specialized Common Carrier Services*, 29 FCC 2d 870 (1971), *recon.*, 31 FCC 2d 1106 (1971), *aff'd Washington Util. & Transp. Comm'n v. FCC*, 513 F.2d 1142 (9th Cir. 1975), *cert. denied*, 423 U.S. 836 (1975) ("specialized"/private line services); *Resale and Shared Use of Common Carrier Services*, 60 FCC 2d 261 (1976), *recon.*, 62 FCC 2d 588 (1977), *aff'd AT&T v. FCC*, 572 F.2d 17 (2d Cir. 1978), *cert. denied*, 439 U.S. 875 (1978) (*Resale Decision*).

[8] *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365 (D.C. Cir. 1977).

we opened interstate services generally to competition by the end of the decade.[9]

4. The Commission initiated the *Competitive Carrier* proceeding in 1979 to examine the proper scope of regulation in the new era of competition and, in particular, to consider amendment of the tariff filing requirements for competitive telecommunications common carriers.[10] We proposed to apply different rules to different carriers depending upon the extent of their market power. "Dominant" carriers—primarily AT&T and its then-affiliated Bell Operating Companies—would continue to be subject to full tariff regulation.[11] For the new competitive (or "nondominant") carriers, which lacked market power, we proposed a more light-handed approach.[12]

5. The Commission posited in *Competitive Carrier* that nondominant carriers, precisely because they lacked market power, would be unable to charge unjust and unreasonable rates in violation of Section 201(b) of the Communications Act,[13] or to discriminate unreasonably in violation of Section 202(a) of the Act.[14] We tentatively concluded that, in these circumstances, traditional tariff regulation of nondominant carriers not only was unnecessary to ensure lawful rates, but actually could be counterproductive: it could raise carrier costs (and rates), delay new services, and encourage collusive pricing.[15]

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[9] *MTS and WATS Market Structure*, 81 FCC 2d 177 (1980).

[10] *Competitive Carrier Notice*, 77 FCC 2d at 309.

[11] *Id.* at 318-28; *First Report*, 85 FCC 2d at 20-22.

[12] *Competitive Carrier Notice*, 77 FCC 2d at 313-14.

[13] 47 U.S.C. § 201(b).

[14] *Id.* § 202(a); *see Competitive Carrier Notice*, 77 FCC 2d at 334-36.

[15] *Competitive Carrier Notice*, 77 FCC 2d at 313-14, 358-59.

6. As an initial step in the regulatory reform process, we adopted a "streamlined" form of tariff regulation for nondominant carriers, which included reduced notice periods and cost support requirement for tariff filings, and the requirement that parties seeking suspension of such filings overcome a presumption of lawfulness.[16] Concurrently, however, we sought comment on two alternatives to streamlining. Under one option, the Commission would "forbear" from exercising the full range of its Title II regulatory powers, including tariff regulation, while continuing to apply the Act's substantive ratemaking standards contained in Sections 201(b) and 202(a).[17] Under a second, "definitional option," we would find telecommunications providers that lacked market power not to be "common carriers" under the Act,[18] and thus subject to broad deregulation.[19]

7. In the *Second Report*, issued in 1982, we adopted the forbearance option, without ruling on our authority to pursue a definitional approach.[20] Proceeding in a cautious, incremental manner, we applied forbearance first to resale carriers, ordering that such carriers "no longer need adhere to . . . the tariff filing requirements of Section 203." [21] The substantive standards contained in Sections 201(b) and 202(a) thereafter would be enforced against such carriers primarily through the complaint process under Section 208 of the Act.[22] In 1983, the

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[16] *First Report*, 85 FCC 2d at 30-40.

[17] *Competitive Carrier Notice*, 77 FCC 2d at 359-63; *see Competitive Carrier Further Notice*, 84 FCC 2d at 471-91.

[18] *Competitive Carrier Notice*, 77 FCC 2d at 363-68.

[19] *Id.*; *see Competitive Carrier Further Notice*, 84 FCC 2d at 463-70.

[20] 91 FCC 2d at 61-62 & n.7.

[21] *Id.* at 73.

[22] 47 U.S.C. § 208; *see Second Report*, 91 FCC 2d at 70-71. We also noted that we could "reimpos[e] . . . the tariff filing require-

Commission extended this permissive detariffing treatment to other nondominant carriers, including so-called "specialized carriers" such as MCI and US Sprint,[23] and, a year later, we accorded such treatment to virtually all remaining categories of nondominant carriers.[24]

8. The Commission converted its permissive detariffing rules into a mandatory detariffing requirement for nondominant carriers in 1985.[25] The United States Court of Appeals for the District of Columbia Circuit vacated and remanded that decision, holding that the FCC lacked statutory authority to *prohibit* carriers from filing tariffs.[26] The court, however, explicitly did "not reach the question whether the FCC's earlier permissive orders are invalid," [27] and the permissive detariffing rules have remained a cornerstone of the Commission's regulatory regime since that time.

B. *AT&T's Complaint*

9. On August 7, 1989, AT&T filed a complaint against MCI alleging that MCI was violating Section 203 of the Communications Act by providing interstate telecommunications services to certain large business customers at rates and on terms and conditions not set forth in interstate tariffs.[28] AT&T claimed that, notwithstanding the Commission's permissive detariffing rules, the plain language

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ment" at a later time in the "unlikely event" that the complaint process proved inadequate to that task. *Id.* at 70.

[23] *Fourth Report*, 95 FCC 2d at 578.

[24] *Fifth Report*, 96 FCC 2d at 1191.

[25] *Sixth Report*, 99 FCC 2d at 1020.

[26] *MCI v. FCC*, 765 F.2d at 1192.

[27] *Id.* at 1196.

[28] *See AT&T Communications v. MCI Telecommunications Corp.* (File No. E-89-297), 7 FCC Rcd 807 (1992), *pet. for review pending, AT&T v. FCC*, D.C. Circuit No. 92-1053.

of Section 203 requires all carriers to file tariffs. In support of this contention, AT&T relied principally upon the D.C. Circuit's 1985 *MCI v. FCC* decision vacating our mandatory detariffing requirement,[29] and on the Supreme Court's subsequent decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*,[30] addressing the "filed rate" doctrine under the Interstate Commerce Act (ICA).[31]

10. Recognizing that AT&T's complaint was, in effect, an attack on the legality of the *Competitive Carrier* permissive detariffing rules, with potentially important consequences for the entire telecommunications industry, we concluded that the issues AT&T raised should be addressed in a broader rulemaking proceeding rather than a two-party adjudication.[32] We initiated this rulemaking proceeding for that purpose.[33]

III. THE PLEADINGS

11. Of the more than forty parties that responded to the *Notice*, only six parties, led by AT&T, claim that the Commission was without authority to adopt its permissive detariffing rules.[34] These commenters stress that Section 203 of the Communications Act requires that every common carrier file with the Commission schedules showing all charges for itself and showing the classifications, practices, and regulations affecting such charges.[35] They claim

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[29] 765 F.2d at 1186.

[30] 110 S.Ct. 2759 (1990).

[31] *See AT&T v. MCI*, 7 FCC Rcd at 808, para. 8.

[32] *AT&T v. MCI*, 7 FCC Rcd at 809, paras. 14-17.

[33] *Notice*, 7 FCC Rcd 804; *see also AT&T v. MCI*, 7 FCC Rcd at 809-10, paras. 17-18.

[34] These parties are AT&T, Alascom, Mobile Marine Radio, NYNEX, US West, and USTA.

[35] AT&T Comments at 3; *see also* Alascom comments at 3; NYNEX Comments at 6; US West comments at 4-5; USTA Reply Comments at 2-3.

that the "plain language of Section 203" means that the Commission "has no authority" to relieve any carriers, including nondominant carriers, of the obligation to file tariffs.[36] To bolster this construction, they cite various court decisions interpreting Section 203 and similar provisions of the Interstate Commerce Act, upon which the Communications Act provisions are generally patterned.[37]

12. Apart from the allegedly mandatory language of Section 203 itself, opponents of the Commission's current rules also claim that forbearance is inconsistent with the statutory scheme as a whole. In particular, they stress that the filing of tariffs provides the Communications Act's "central protection" against unjust, unreasonable, or unreasonably discriminatory rates and practices, and that the Commission may not dispense with that protection, even in a competitive environment.[38]

13. On the other hand, users, nondominant carriers, enhanced service providers, competitive access providers, some local exchange carriers, and others support our current rules. These parties generally dispute claims that the plain language of Section 203 forbids permissive detariffing. They state that the otherwise mandatory language in Section 203(a) that carriers "shall" file tariffs must be read in light of the equally explicit statement in Section 203(b)(2) that the Commission may "modify any requirement made by or under authority of this section," and the provision in Section 203(c) permitting a carrier to offer service without a tariff when "otherwise provided by or under authority of this Act."[39] These parties con-

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[36] *See, e.g.*, AT&T Comments at 3; USTA Comments at 2-3.

[37] *See, e.g.*, AT&T Comments at 4-7 (citing *MCI v. FCC*, 765 F.2d at 1186; *Maislin*, 110 S.Ct. at 2759; *Resale Decision*, 572 F.2d at 17); US West Comments at 5-7 (citing, in addition, *AT&T v. FCC*, 487 F.2d 865 (2d Cir. 1973) (*Special Permission Decision*)).

[38] *See, e.g.*, Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

[39] *See, e.g.*, Ad Hoc Comments at 7-10; FEMC Comments at 3-6; OCOM Comments at 9-12; MCI Comments at 6-7, 14-18.

tend that this express power to modify the tariff filing requirements gives the FCC ample authority to adopt permissive detariffing.[40]

14. Supporters of permissive detariffing also point to repeated instances over the past decade in which Congress has demonstrated its awareness of the Commission's existing rules without attempting to overturn them.[41] They claim, in particular, that the recent enactment of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA),[42] indicates Congressional acquiescence in our interpretation of our forbearance authority.[43] Noting that TOCSIA reimposes limited tariffing requirements on some nondominant carriers—*i.e.*, operator service providers—these commenters contend that the legislation was "clearly founded on a baseline of forbearance for other nondominant carriers' services," [44] without disturbing that baseline.[45]

IV. DISCUSSION

15. Upon consideration of the record developed in this proceeding and our analysis of the law, we conclude that, in light of the language of Section 203, the Commission may lawfully permit nondominant carriers not to file

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[40] *See, e.g.*, Comptel Comments at 2-5, 7-9; MCI Comments at 8-14; CTIA Comments at 11-14.

[41] *See, e.g.*, MCI Comments at 25-45; Comptel Comments at 9-14; Comptel Reply Comments at 6-8.

[42] P.L. 101-435 (codified at 47 U.S.C. § 226 (West Supp. 1990)).

[43] *See, e.g.*, Ad Hoc Comments at 10-13; Comptel Comments at 9-11; FEMC Comments at 8-12; OCOM Comments at 5-7; IBM Comments at 4-6.

[44] *See, e.g.*, Ad Hoc Comments at 12 n.9; *see also* Comptel Comments at 9-12; FEMC Comments at 9-12; OCOM Comments at 5-7; MCI Comments at 34-35; IBM Comments at 5-6.

[45] *See* CTIA Comments at 15-16 (quoting 47 U.S.C. § 226(i) ("Nothing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this Act.")).

tariffs. We also find that our conclusion in the *Competitive Carrier* decisions—that permissive detariffing furthers the purposes of the Communications Act and meets the substantive requirements of Sections 201(b) and 202(a), which require that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory—is still valid given the growth and development of the interexchange market.[46] Consequently, we conclude that our forbearance rules that permit nondominant carriers not to file tariffs are both lawful and desirable as serving the public interest.

A. *Permissive Detariffing Is Lawful Under the Communications Act*

1. *The "Plain Language" of the Act Allows Permissive Detariffing*

16. Opponents of the Commission's permissive detariffing rules claim that the plain language of Section 203 requires tariff filings by all carriers and, thus, that the Commission lacks the power to relieve carriers of this requirement, regardless of whether tariffs otherwise serve the broader purposes of the Act.[47] Section 203 of the Communications Act provides, in pertinent part:

> (a) Every common carrier . . . shall, within such reasonable time as the Commission shall designate, file with the Commission . . . schedules showing all charges for itself . . . and showing the classifications, practices, and regulations affecting such charges. . . .
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> (b)(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under authority of this section either in particular instances or by general order applicable to special

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[46] *See Second Report*, 91 FCC 2d at 71; *Competitive Carrier Further Notice*, 84 FCC 2d at 478-84.

[47] *See, e.g.*, AT&T Comments at 2-3; US West Comments at 6.

> circumstances or conditions except that the Commission may not require the notice specified in paragraph (1) to be more than one hundred and twenty days.
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> (c) No carrier, unless otherwise provided by or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder; and no carrier shall . . . charge, demand, collect, or receive a greater or less or different compensation, for such communications, or for any service in connection therewith . . . than the charges specified in the schedule then in effect. . . .

17. Although the language of Section 203(a) and 203(c) states that "every" common carrier "shall" file tariffs and "no carrier . . . shall engage or participate in such communication unless schedules have been filed and published . . .," [48] we find that other language within Section 203 limits those commands. Specifically, under Section 203(b)(2) the Commission is granted equally explicit authority to "modify *any requirement*"—save one—"made or under authority of this section." [49] By its terms, Section 203(b)(2) limits the Commission's modification power in one circumstance only—the FCC "may not" expand the 120-day period notice period for tariff filings prescribed in Section 203(b)(1). We believe that this specific, narrow limitation on the Commission's modification power strongly suggests that Congress did not otherwise intend to limit our authority, upon a proper public interest showing, to alter the requirements of Section 203. As we noted in *Competitive Carrier*, "[t]he words 'this section' clearly refer to the entire Section 203. When Congress

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[48] *See MCI v. FCC*, 765 F.2d at 1191 ("'Shall' . . . is the language of command, [and] . . . [a]bsent a clearly expressed legislative intention to the contrary, courts ordinarily regard such statutory language as conclusive.") (internal quotations omitted).

[49] 47 U.S.C. § 203(b) (emphasis added).

wished to identify subsections, it used the word 'subsection' or 'paragraph' (followed by the letter or number) throughout the Act. *See, e.g.*, Sections 204, 213." [50] Thus, this modification power may be employed to alter the tariff filing requirements of both subsections (a) and (c) of Section 203.

18. Similarly, Section 203(c)'s prohibition against providing service without a tariff applies "*unless otherwise provided* by or *under authority of this Act*." [51] In *Competitive Carrier*, we noted that Section 203(b)(2) may be construed as the authority referenced in 203(c).[52] We find no evidence that Congress intended that the Section 203(b) power to modify the requirements prescribed under Sections 203(a) and 203(c) be limited to particular requirements except the requirement explicitly mentioned (the 120-day notice period). We agree with those parties that assert that without specific limitations upon the Commission's authority, Congress intended for the FCC to have broad powers that could be exercised as the public interest requires.[53] Consequently, we find that Section 203 permits the FCC to exercise its authority under Section 203(b) in order to alter the tariff filing requirements of both subsections (a) and (c) of Section 203 as long as the FCC demonstrates that the goals of the Communications Act will be met and that the public interest would be served thereby.[54] We therefore reaffirm our conclusion

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[50] *Competitive Carrier Further Notice*, 84 FCC 2d at 480 n.69.

[51] 47 U.S.C. § 203(c) (emphasis added).

[52] *See* 84 FCC 2d at 481.

[53] *See, e.g.*, IBM Comments at 2; GTE Comments at 12; MCI Comments at 21.

[54] Moreover, in the absence of any explicit statutory prohibition, Section 4(i) of the Act, 47 U.S.C. § 154(i), provides additional authority for forbearance. *See, e.g., New England Tele. & Tel. v. FOC*, 826 F.2d 1101, 1108 (D.C. Cir. 1987), *cert. denied*, 109 S.Ct. 1942 (1989) ("section 4(i) is a 'necessary and proper clause' empowering the Commission to 'deal with the unforeseen . . . to

in *Competitive Carrier* that these provisions defeat any claim that permissive detariffing is facially inconsistent with Section 203.[55]

19. Nor do the cases cited in support of the "plain language" construction alter our analysis. In *MCI v. FCC*, the court held that our Section 203(b) authority to "modify" tariffing requirements did not permit the Commission to convert the statutory command that carriers "*shall*" file tariffs into a requirement that carriers *shall not* do so. The petitioner in that case was a non-dominant carrier that wished to file tariffs and that asserted, among other things, that the Commission's decision to prevent it from doing so would cause it harm.[56] The

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the extent necessary to regulate effectively those matters already within the boundaries'") (*quoting North American Telecomm. Ass'n v. FCC*, 772 F.2d 1282, 1292 (7th Cir. 1985)). It has long been recognized that the FCC, as the expert agency, has ample discretion in this dynamic field of communications. *See FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940); (the Communications Act is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy"); *Bell Telephone of Pennsylvania v. FCC*, 503 F.2d 1250, 1256 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1974). Absent explicit statutory direction, we have well-established discretion in choosing how to regulate, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. at 138; *National Broadcasting Co. v. U.S.*, 319 U.S. 190, 218-19 (1943); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73, 180-81 (1968); *CCIA v. FCC*, 693 F.2d at 212, including the discretion "not to exercise particular authority which . . . has been granted." *NARUC v. FCC*, 533 F.2d 601, 620 n.113 (D.C. Cir. 1976). Because the Commission continues to ensure that the substantive requirements of the Act are met, it is free to exercise its discretion. *Cf. FPC v. Texaco*, 417 U.S. 380 (1974) (indirect regulation of small natural gas producers' rates is permissible so long as the FPC properly applies the Act's substantive standards to those rates).

[55] *Second Report*, 91 FCC 2d at 71; *see Competitive Carrier Further Notice*, 84 FCC 2d at 478-84.

[56] *See MCI v. FCC*, D.C. Circuit No. 85-1030, Brief of MCI, filed April 1, 1985, at 59-60; *id.*, Reply Brief of MCI, filed May 15, 1985,

court stated that in such a context, Section 203(b) did not justify the "wholesale abandonment or elimination" of tariff filings.[57] The court, however, did not—and, in light of other precedent permitting tariff forbearance in limited contexts,[58] could not—find that Section 203 facially precluded permissive detariffing. Indeed, the court in *MCI v. FCC* noted that our permissive detariffing rules were "fundamentally" different from those it struck down, and it expressly did "not reach the question whether [those] . . . permissive orders are invalid." [59]

20. Similarly, the Supreme Court's decision in *Maislin* also is not dispositive here.[60] The Court held in that case that the Interstate Commerce Commission (ICC) could not "relieve a shipper of the obligation of paying the filed rate when the shipper and carrier ha[d] privately negotiated a lower rate." [61] That core holding simply reaffirms the "filed rate doctrine," which courts previously have applied in Communications Act cases as well.[62] By con-

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at 26-27. In fact, the court in *MCI v. FCC* suggested that the *only* statutory interest properly raised in that case was the interest of the nondominant carrier in being *permitted* to file tariffs. The court noted that "[o]nly when the Commission turned permission into command [in the *Sixth Report*] did MCI's aggrievement become evident and plainly adequate to support a challenge" to the Commission's action. *MCI v. FCC*, 765 F.2d at 1190.

[57] 765 F.2d at 1192.

[58] *See infra* Section IV.A.2.

[59] *MCI v. FCC*, 765 F.2d at 1190, 1196. *See Richman Bros. Records v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1436 (3rd Cir. 1991) (*MCI v. FCC* did not address lawfulness of permissive detariffing).

[60] *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990).

[61] 110 S. Ct. at 2762.

[62] *See, e.g., American Broadcasting Cos. v. FCC*, 643 F.2d 818, 819 (D.C. Cir. 1980).

trast, our forbearance rules allowing permissive detariffing are consistent with that long-established doctrine.[63]

21. Moreover, we note that the specific motor common carrier tariff filing provisions at issue in *Maislin* facially differ in important respects from Section 203 of the Communications Act. In particular, the motor carrier analogues to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the "requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority contained in Section 203(b) applies, by its terms, to both the obligation to file tariffs (Section 203(a)) and the prohibition against untariffed offerings (Section 203(c)).

22. In addition, although Section 10761(a)'s requirement (like that in Section 203(c)) is applicable "[e]xcept as provided in this subtitle," the *Maislin* Court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the requirements of Section 10761(a),[64] thus "demonstrating that Congress is aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers."[65] Not only is there a lack of

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[63] *See Competitive Carrier Further Notice*, 84 FCC 2d at 483-84; *Certified Collateral Corp. v. Allnet Communications Servs., Inc.*, 2 FCC Rcd 2171, 2174 n.13 (Com. Car. Bur. 1987).

[64] *See* 49 U.S.C. § 10761(b).

[65] 110 S. Ct. at 2771 (emphasis in original).

similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.[66]

23. Furthermore, we stress that courts have recognized that while there are "similarities" between the Interstate Commerce Act (ICA) and the Communications Act, the FCC should not be "restrict[ed] . . . to a course of action that has been dictated by the requirements of the transportation industry."[67] For instance, in holding that the FCC's authority to modify tariff notice periods was greater than that accorded the ICC under former Section 6(3) of the ICA, the Second Circuit stressed that Section 203 of the Communications Act, in particular, is "not . . . a carbon copy of the Interstate Commerce Act."[68]

24. We also find that the *Special Permission Decision*, in which the Second Circuit stated that Section 203(b) authorized modifications only "as to the form of, and information contained in, tariffs," does not alter our analysis.[69] Not only was such language *dicta*, but like the mandatory detariffing at issue in *MCI v. FCC*, and unlike the permissive detariffing rules at issue here, the "special permission" requirement in that case had the effect of *prohibiting* AT&T from filing tariffs.[70] The court there explained that there had been "[n]othing in Section 203(b) to justify such procedure . . . [which] was in effect a rate "prescription" and inconsistent with 47 U.S.C. § 205, which authorizes rate prescriptions only after a full

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[66] *See infra* paragraphs 30-34.

[67] *General Telephone Co. of the Southwest v. U.S.*, 449 F.2d 846, 856 (5th Cir. 1971).

[68] *AT&T v. FCC*, 503 F.2d 612, 616, 617 (2d Cir. 1974).

[69] 487 F.2d 865, 879 (2d Cir. 1973).

[70] *See* 503 F.2d at 617.

hearing and specific findings." [71] Since Section 203(b), by its terms, grants the Commission authority to modify only the requirements of Section 203 itself, the Court understandably found that it did not justify a procedure that conflicted with another section of the Act.

25. Similarly, we do not find the Second Circuit's *Resale Decision* controlling. In that case, the court upheld the Commission's discretion in its administration and interpretation of the Communications Act.[72] While the FCC at that time determined not to forbear completely from Title II regulation of resale carriers, it noted in its order on review that "[l]ater experience may show that the public interest would be served by deregulation of resellers. If so, to the extent that the law allows it, we will review the matter and act accordingly." [73] The Commission has subsequently reconsidered the issue of forbearance in its *Competitive Carrier* decision,[74] and concluded that permissive detariffing, combined with enforcement of Title II substantive standards through the complaint process, was lawful and in the public interest.[75] Particularly because statutes governing administrative action may be susceptible of more than one valid interpre-

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[71] *Id.*

[72] *Resale Decision*, 572 F.2d at 25.

[73] *Resale and Shared Use of Common Carrier Service*, 60 FCC 2d 261, 308 (1976).

[74] *See Competitive Carrier Notice*, 77 FCC 2d at 360-61.

[75] *Second Report*, 91 FCC 2d at 70-71, 73. Indeed as the D.C. Circuit held in *Geller v. FCC*, 610 F.2d 973, 978-81 (D.C. Cir. 1979), our "public interest" mandate requires us to reexamine and adjust our regulations—as we did in *Competitive Carrier*—in light of changed circumstances. As stated in the *Fourth Report*, the Commission generally has the "duty to determine that its rules promote the public interest when applied to particular carriers or applicants, and to refrain from imposing and to remove unncessary regulatory burdens on carriers." *Fourth Report*, 95 FCC 2d at 580.

tation,[76] the Second Circuit's decision to uphold the Commission's own interpretation of its authority in the different context of the *Resale Decision* provides no support for a facial challenge to our permissive detariffiing rules here.

26. Significantly, the opponents' absolutist challenge premised upon the alleged "plain language" of Section 203 proves too much. If there were any merit to their argument, the Commission presumably would be without authority to relieve carriers of the obligation to file tariffs for their interstate common carrier services under *any* circumstances. That clearly is not the case, however. Courts on several occasions have recognized our power to forbear from requiring the filing of federal tariffs for interstate common carrier services in other contexts.

27. For example, in *Diamond International Corp. v. FCC*,[77] the court upheld the Commission's refusal to disturb the charges for certain *intra*state common carrier services that New York Telephone Company had included in its *intra*state, rather than interstate, tariff. Although the complaining customer in that case argued that Section 203 of the Communications Act required the disputed charges to be included in interstate tariffs,[78] the court upheld the Commission's decision to defer to state regulation of the service in the absence of any unreasonable burden on interstate communication.[79] Similarly, in

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[76] *See, e.g., Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1079-90 (D.C. Cir. 1987) (en banc), *cert. denied*, 485 U.S. 913 (1988); *American Federation of Government Employees v. FLRA*, 777 F.2d 751, 759 (D.C. Cir. 1985).

[77] 627 F.2d 489 (D.C. Cir. 1980).

[78] *Id.* at 490.

[79] *Id.* at 493. *See also New York Telephone Company v. FCC*, 631 F.2d 1059, 1067 (2d Cir. 1980) (noting that Commission may permit state, rather than federal, tariffing of interstate component of mixed interstate/intrastate service if state regulation does not discriminate against interstate customers).

CCIA v. FCC,[80] the D.C. Circuit upheld the Commission's decision to forbear from all Title II regulation—including tariff regulation—of certain enhanced services and customer premises equipment that otherwise would be subject to such common carrier regulation, where the Commission found that the "difficulty in isolating activities subject to Title II regulation outweighs the benefits to be gained by that regulation." [81] In fact, the court stated: "To the extent that certain enhanced services could lawfully be regulated under Title II once they were identified as common carrier services, we sanction the Commission's forbearance from Title II regulation." [82] We believe that these cases indicate that Section 203 does confer some discretion upon the FCC in determining how to apply that section so that the public interest is served.[83]

2. *Congress Has Acquiesced In Permissive Detariffing.*

28. As demonstrated above, we believe that Section 203 can be read to permit the FCC to adopt forbearance rules when the public interest so requires. We recognize, however, the contentions of some of the parties that Congress could not have foreseen the development of non-dominant carriers and thus did not address the precise

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[80] *Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (*CCIA v. FCC*).

[81] *CCIA v. FCC*, 693 F.2d at 211.

[82] *Id.* at 210. We recognize that the Commission asserted, as the primary ground for its decision not to apply Title II regulation to enhanced services and CPE, that the offerings were not "common carrier" services at all. The court explicitly held, however, that the Commission's action was "sustainable on either of the grounds asserted by the Commission." *Id.* at 209.

[83] For other instances in which the Commission declined in its discretion from regulating facilities and services, see our orders cited in the *Second Report*, 91 FCC 2d at 66-67.

issue.[84] Given that Section 203 was enacted long before a competitive long distance market was even foreseeable, we agree that it is reasonable to conclude that Congress lacked any specific intention regarding the regulatory treatment of nondominant carriers. Section 203 tariff filing requirements were enacted in the context of a monopoly telephone market in order to protect the public from the unlawful rates and practices of the monopoly carrier that exercised unchecked market power. There is no indication that Congress ever considered at the time it enacted Section 203 whether carriers that lacked such market power should also be subject to the full tariff filing requirements of Sections 203(a) and 203(c) if it did not serve the public interest. In tailoring our tariffing policies to the onset of competition in telecommunications, therefore, we have addressed, as we may, circumstances not dealt with directly in the organic statute.[85]

29. Nevertheless, we find that since the time it enacted Section 203, Congress has acquiesced in the FCC's present forbearance rules. We believe these manifestations of legislative intent provide additional support for our conclusion that we have authority to adopt permissible detariffing rules.

30. Most significantly, in its recent enactment of the TOCSIA, Congress has demonstrated its awareness of the Commission's forbearance policy and made no attempt to disturb it.[86] That amendment to the Communications Act requires, *inter alia*, that operator service providers (OSPs), which are common carriers, file "informational

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[84] *See, e.g.*, CTIA Comments at 18 n.16; OCCM Comments at 16-17.

[85] *See U.S. v. Southwestern Cable Co.*, 392 U.S. at 172-73; *NARUC v. FCC*, 525 F.2d 630, 638 n.37 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976).

[86] 47 U.S.C. § 226.

tariffs." [87] TOCSIA also authorizes the Commission to waive the filing requirement after four years if it finds that consumers are benefitting from competition to meet statutory objectives.[88]

31. TOCSIA's legislative history makes clear that Congress was aware of the Commission's permissible detariffing rules with respect to nondominant carriers, and that it statutorily modified our authority to forego requiring tariffs for a small subset of common carrier services—involving OSPs—while leaving the existing regulatory baseline intact. First, the committee reports specifically note that many OPSs were considered to be "nondominant" under our *Competitive Carrier* rules and that we had "chosen to 'forbear' " from full Title II regulation of those carriers.[89]

32. Second, the required informational tariffs substantially overlap in scope and purpose the tariff filings provided for in Section 203. Section 226(h)(1)(A) provides that OSPs "shall file . . . an informational tariff specifying rates, terms, and conditions" for operator services.[90] Congress explained that "[t]his tariff filing requirement is intended to allow members of the public and the FCC to review and, if necessary, investigate these carriers' rates." [91] This informational tariff requirement would be mere surplusage if Congress believed that the

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[87] *Id.* § 226(h).

[88] *See* 47 U.S.C. § 226(h)(1)(B); 47 U.S.C. §§ 226(d)(1)(A) & (B); S. Rept. No. 101-439, Senate Committee On Commerce, Science, and Transportation, 101st Cong., 2d Sess., at 23 (August 30, 1990).

[89] S. Rept. No. 101-439, Senate Committee On Commerce Science, and Transportation, 101st Cong., 2d Sess., at 3 & n.10 (August 30, 1990); *see also* H. Rept. No. 101-213, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 3, 5-6 (August 3, 1989).

[90] *Cf.* 47 U.S.C. § 203(a) (requiring that tariffs include "charges" and "classifications, practices, and regulations affecting such charges").

[91] S. Rept. No. 101-439, at 23.

FCC had incorrectly interpreted Section 203 as allowing permissive detariffing.[92] In this regard, we find it noteworthy that virtually at the same time Congress enacted TOCSIA, it also amended Section 203 itself.[93] Although Congress was well aware of the Commission's permissive detariffing rules at that time, as evidenced by the contemporaneous TOCSIA legislative history, Congress made no attempt to disturb the Commission's interpretation of its authority under Section 203.

33. Finally, in permitting waiver of the informational tariffing requirement after four years, Congress in effect recognized and approved the rationale upon which the Commission based its forbearance regime generally. Congress noted that "[i]f the other provisions of this bill have a positive effect in promoting competitive rates and services, . . . the need for these tariff[] filings diminishes."[94] Under these circumstances, we believe that it is fair to assume that Congress has, at the very least, acquiesced in the Commission's construction of its authority to for-

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[92] Although the informational tariffs required by Section 226(h) must include certain data—*e.g.*, "reasonable estimates of the amount of traffic priced at each rate"—that are not specifically required by Section 203, Congress also made clear that "these informational tariffs are not expected to contain the same detailed cost justification material that typically accompanies the tariffs filed by dominant carriers." S. Rept. 101-439, at 9. *See also* H. Rept. No. 101-213, at 14. Thus, we reject AT&T's contention that the informational tariff filing requirement in Section 226(h) was intended as a *supplemental* requirement (in addition to Section 203 requirements) for OSPs, rather than a substitute for the Section 203 filings that Congress recognized we could excuse. *See* AT&T Reply Comments at 15 & n.*.

[93] *See* Pub. Law 101-396 (approved September 28, 1990) (increasing the notice period (from 90 to 120 days) for tariff filings); *see also* H. Rept. No. 101-316, House Committee on Energy and Commerce, 101st Cong., 1st Sess., at 7-8 (Oct. 27, 1989) (expressing Congress' sentiment that the increased notice period should be used only for local exchange carriers' annual access tariff filings).

[94] S. Rept. No. 101-439, at 23.

bear from requiring nondominant carriers to file tariffs under Section 203 of the Communications Act.

34. Therefore, while we recognize that courts may be reluctant to infer Congressional approval of an agency's interpretation of its organic statute based solely upon Congressional inaction,[95] Congress' record over the past decade since we adopted our permissible detariffing rules displays far more than unknowing silence with respect to those rules. Congress has repeatedly acted in the telecommunications area over the past decade that the Commission's policy was in effect and failed to alter or repeal this fundamental policy.[96] Thus, we conclude that the enactment of TOCSIA, which is predicated upon a baseline of forbearance, as well as the failure of Congress to express its reservations about our forbearance rules, supports the interpretation of our authority that we adopted in *Competitive Carrier*.[97]

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[95] *See, e.g., Demarest v. Manspeaker*, 111 S. Ct. 599, 603-04 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989); *Ashton v. Pierce*, 716 F.2d 56, 63 (D.C. Cir. 1983).

[96] *See, e.g.*, H.R. Rep. No. 96-1252, 96th Cong., 2d Sess., pt. 2 at 1 (1980); H.R. 5158, 97th Cong., 2d Sess. (1981) (Telecommunications Act of 1982); H.R. Conf. Rpt. No. 765, 97th Cong., 2d Sess. 56 (1982); FCC Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (1989); H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3 (1989). *See also* MCI Comments at 25-35; CompTel Comments at 9-13.

[97] Courts have often held that where Congress is aware of an agency's interpretation and has not sought to alter it despite making other amendments to the statute, it can be presumed that legislative intent has been correctly discerned. *See, e.g., United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 132, 137 (1985); *Bob Jones University v. U.S.*, 461 U.S. 574, 599-602 (1983); *New Haven Board of Educations v. Bell*, 456 U.S. 512, 533-35 (1982); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

B. *Permissive Detariffing Advances the Purposes of the Communications Act*

35. On the basis of our thorough review of permissive detariffing in the *Competitive Carrier* decisions and the record in this proceeding, we continue to believe that our forberance policy furthers the statutory purposes of the Communications Act. The fundamental statutory purpose contained in Section 1 of the Act is "to make available . . . to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges. . . ."[98] As the Commission recognized in *Competitive Carrier*, the tariff filing procedures set forth in Section 203 of the Communications Act were designed principally to facilitate enforcement of the substantive requirements, contained in Sections 201(b) and 202(a), that carriers' rates and practices be just, reasonable, and not unreasonably discriminatory.[99] In implementing permissible detariffing, we sought to adapt our regulation of telecommuncations common carriers to the changed circumstances of competition and to develop a regulatory approach that furthers the purposes of the Act while fostering innovation and the efficient development of the telecommunications industry.[100] We did not discard the standards of Section 201(b) or 202(a), but rather committed to enforcing them through the complaint process in the event that "irrational carrier conduct or aberrations" occur.[101]

36. In the *Competitive Carrier* decisions, we further concluded the mandatory tariff regulation of nondominant carriers was in fact at odds with the fundamental statutory purpose set forth in Section 1 of the Act because it

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[98] 47 U.S.C. § 151; *see Second Report*, 91 FCC 2d at 64.

[99] *Second Report*, 91 FCC 2d at 71; *Competitive Carrier Further Notice*, 84 FCC 2d at 483.

[100] *Second Report*, 91 FCC 2d at 60, 62.

[101] *Id.* at 70; *see* 47 U.S.C. § 208.

inhibits price competition, service innovation, entry into the market, and the ability of firms to respond quickly to market trends.[102] We found that in the case of nondominant carriers, which by definition lack substantial market power, such barriers and burdens impair competition by delaying or deterring carriers in their service and rate offerings and causing them to bear additional costs. We held that, consequently, the users would pay higher rates and that the services available to meet the needs of users would be limited.[103] Moreover, we additionally held that by allowing permissive detariffing, the risk of collusive pricing would be diminished.[104]

37. We conclude that mandatory tariff filing requirements continue to be unnecessary for nondominant interexchange carriers (IXCs) because they continue to lack market power. If such carriers sought to charge unreasonable rates in violation of Section 201(b) or to discriminate unreasonably in violation of Section 202(a), customers would simply move to other carriers.[105] We agree with those parties stating that the competitive forces in the marketplace serve to ensure, in the first instance, carrier compliance with the obligations imposed by Sections 201(b) and 202(a).[106] While some commenters argue

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[102] *Second Report*, 91 FCC 2d at 62, 65, 71 *Competitive Carrier Further Notice*, 84 FCC 2d at 453, 456, 471, 479.

[103] *Fourth Report*, 95 FCC 2d at 580.

[104] *Id.* at 556.

[105] *See First Report*, 85 FCC 2d at 31; *Second Report*, 91 FCC 2d at 69.

[106] *See, e.g.*, RCI Long Distance Comments at 2 (market forces are sufficient to guarantee that rates and practices will be reasonable, because dissatisfied customers can simply and inexpensively pick another carrier); OCOM Comments at 17-18 (the lack of market power by [nondominant carriers] assumes that the public will be afforded the just and reasonable rates required under . . . the Act by ensuring a competitive environment in which pricing is determined by market forces); *see also Second Report*, 91 FCC 2d at 61; *Further Notice*, 84 FCC at 495.

that the FCC's forbearance policy alters the statutory scheme envisioned by Congress by making it difficult or impossible to ensure that nondominant carriers comply with the Act's substantive requirements that rates be just, reasonable, and not unreasonably discriminatory, we disagree given the competitive evolution of the industry.[107] Further, we note that the complaint process under Section 208 remains available in the event allegations of unjust or unreasonable rates are made.[108] Significantly, we emphasize that if competitive forces fail to ensure carrier compliance with the obligations imposed by Sections 201(b) and 202(a), we will rely not only upon our complaint process but also upon our ability to reimpose tariff-filing requirements as necessary to protect the public from unjust or unreasonable rates charged by carriers operating under permissive detariffing.[109]

38. We also continue to believe that altering our forbearance policy would frustrate the overriding goals of the Act.[110] We agree with those commenters that argue that the purposes of the Act would be thwarted if the Commission were to reimpose full tariff regulations on competitive, nondominant carriers that provide services

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[107] *See, e.g.*, Mobile Marine Radio Comments at 3-6; USTA Reply Comments at 3-4.

[108] 47 U.S.C. § 208. Significantly, under our rules, any party filing a complaint under Section 208 is entitled to discovery in order to ascertain pertinent information regarding carriers' rates and practices. *See* 47 C.F.R. §§ 1.729-1.730 (1992).

[109] *See Fourth Report*, 95 FCC 2d at 579-80.

[110] *See, e.g.*, NTCA Comments at 2-3; GTE Comments at 9-10; *see also Second Report*, 91 FCC 2d at 60-61; *Fourth Report*, 95 FCC 2d at 555. We concluded in the *Fourth Report* that applying Section 203(a) requirements to nondominant carriers thwarts the goals of the Act by fostering inefficiencies and imposing costs on carriers and consumers without offsetting benefits to consumers. *Fourth Report*, 95 FCC 2d at 555, 557.

in a working market.[111] We agree with those parties that assert that the forbearance policy developed in the *Competitive Carrier* decisions has played a major role in the rapid development of competition and in the consumer benefits that have resulted.[112] Moreover, the record here confirms that but for permissive detariffing, at least some of the current telecommunications market participants likely would not have entered into the competitive fray at all.[113]

39. We conclude that permissive detariffing has proven to be a success over the years, as evidenced by the robust competition in the interexchange market and the increased choices for customers with respect to carriers and prices.[114] The decade of actual experience under permissive detariffing provides further confirmation of the success of that approach in furthering the statutory goals of the Communications Act.[115] In 1982, approximately a dozen

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[111] *See, e.g.*, RCI Long Distance Comments at 1-2 (tariff process provides a disincentive for innovation and inhibits price competition); *see also* OCOM Comments at 1-2; TCA Comments at 5.

[112] *See, e.g.*, Comptel Comments at 5-6; AOC Long Distance Comments at 4; Ad Hoc Comments at 3-5; Commonwealth Long Distance Comments at 1-3, 5-6; ICA Comments at 2; OCOM Comments at 1-2; RCI Long Distance Comments at 1-2.

[113] *See, e.g.*, Interexchange Resellers Association Comments at 1-2; LOCATE Comments at 7-8; TCA Comments at 5-6; RCI Long Distance (new IXCs can enter niche markets for interstate services without costly filings and lengthy regulatory delays); OCOM Comments at 8 (many of the smaller carriers today would not be here now or be able to continue offering competitive services under a more burdensome regulatory structure).

[114] Based upon the past decade of growth and competition in the interexchange market, we disagree with those commenters that contend that the current application of the forbearance doctrine creates artificial competition because some but not all participants must file tariffs with cost support. *See, e.g.*, PacTel Comments at 2; NYNEX Comments at 13; Alascom Comments at 4-5.

[115] Indeed, in the *Interexchange Order*, we concluded based upon the extensive record in that proceeding, that competition had flour-

long distance carriers operated within the United States.[116] By March 1992, there were an estimated 482 such carriers purchasing switched access from local exchange carriers.[117] Given this evidence, we believe it is clear that our permissive detariffing rules have allowed for new entrants into the interexchange market and have given consumers more flexibility with respect to the price of service, type of services, and selection of carriers.[118] To adopt a different course of action at this time would only frustrate the success of our current policy.

40. Moreover, since 1984, overall interstate calling has grown at an annual rate of about 12%, with carriers other than AT&T posting an average annual growth rate in excess of 25%.[119] During the same period between January 1984 and January 1992, AT&T's share in terms of minutes of the interstate market declined from over

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ished under the market analysis set forth in the *Competitive Carrier* decisions. *See Competition* in the Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880, 5881-82 (*Interexchange Order*). *Cf. American Airlines, Inc. v. CAB*, 359 F.2d 624, 633-34 (D.C. Cir. 1966), *cert. denied*, 385 U.S. 843 (1966).

[116] *See Trends in Telephone Service*, Industry Analysis Divison, Common Carrier Bureau, FCC, at 30 & Table 19 (February 1992).

[117] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 6 & Table 1 (June 16, 1992).

[118] While AT&T states that the Commission already has developed streamlined tariffing procedures in the *First Report* that would not overburden nondominant IXCs and that fully complies with Section 203, we believe that the public interest is better served by allowing permissive detariffing of those carriers that lack substantial market power. AT&T Comments at 8. As we stressed in the *Fourth Report*, forbearance "eliminates a potential vehicle for collusive conduct and facilitates price discounting" and, therefore, serves the public interest better than streamlined regulation. *Fourth Report*, 95 FCC 2d at 556 n.3.

[119] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 34 (September 1992).

80% to just more than 60%,[120] while its rates for directly dialed interstate have also fallen substantially.[121] Several of AT&T's nondominant competitors have engaged in intensive capital investment programs to develop state-of-the-art fiber optic networks, and AT&T now has less than half of the long distance industry's fiber optic route miles.[122] Thus, in light of the successful practical experience with permissive detariffing, we believe not only that this policy advances the broad purposes of the Communications Act and is therefore in the public interest, but also that it would be unreasonable to disturb our current rules in the absence of Congressional or judicial commands.

C. *Additional Matters*

41. In its complaint against MCI that precipitated this rulemaking, AT&T claimed that the permissive detariffing rules we adopted in *Competitive Carrier* were not substantive rules that relieved nondominant carriers of the obligation to file tariffs, but rather an exercise of the Commission's discretion not to enforce the requirements Section 203. In our order resolving that complaint we explained that our permissive detariffing policy was, in fact, a binding substantive rule that removed the tariff filing requirement from nondominant carriers.[123] Having decided here to reaffirm our uncodified forbearance rule,

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[120] *Summary of Long Distance Carriers*, Industry Analysis Division, FCC, at 4 & Table 3 (October 1992). With respect to "high end" business services, AT&T's current market share appears closer to 50%. *See Interexchange Order*, 6 FCC Rcd at 5890.

[121] *Trends in Telephone Service*, Industry Analysis Division, Common Carrier Bureau, FCC, at 13 (February 1992).

[122] *See Competition in the Interstate Interexchange Marketplace*, Notice or Proposed Rulemaking, 5 FCC Rcd 2627, 2633-34 (1990).

[123] *AT&T v. MCI*, 7 FCC Rcd at 809, para. 13.

and in order to remove any possible ambiguity on that issue, we codify the permissive detariffing rule.[124]

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

42. *Need and purpose of this action.* This rulemaking proceeding was initiated to review the continuing lawfulness of the Commission's existing permissive detariffing rules in light of a complaint filed by AT&T alleging, in effect, that these rules violate the Communications Act. This order sustains those rules as being consistent with the Act and the public interest.

43. *Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Act Analysis.* The Initial Regulatory Flexibility Analysis stated that any change in existing rules could have a significant impact on a broad range of telecommunications common carriers. We did not receive any comments that specifically addressed our Initial Regulatory Flexibility Analysis.

44. *Significant alternatives considered and rejected.* The *Notice* did not propose new rules or alternative policies, but sought comment on the lawfulness of our existing permissive detariffing rules and on how they should be changed in the event they are found unlawful. This item reaffirms and codifies our existing rules which minimize regulatory burdens on nondominant carriers.

VI. ORDERING CLAUSES

45. Accordingly, IT IS ORDERED that pursuant to authority contained in Sections 1, 4, and 201-05 of the Communications Act of 1934, amended, 47 U.S.C. §§ 151, 154 and 201-05, Part 61 of the Commission's Rules, 47 C.F.R. Part 61, IS AMENDED as set forth in Appendix B.

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[124] *See* Appendix B.

46. IT IS FURTHER ORDERED, that the policies and rules set forth herein ARE ADOPTED.

FEDERAL COMMUNICATIONS
COMMISSION

DONNA R. SEARCY
Secretary

APPENDIX A: PARTIES FILING COMMENTS

Comments

ACC Long Distance Corp. (ACC)
Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Association for Local Telecommunications Services
Automated Communications, Inc., *et al.*
Cellular Telecommunications Industry Association
Commonwealth Long Distance Company
Communications Transmission, Inc.
Competitive Telecommunications Association
Fairchild Communications Services Company
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Interexchange Resellers Association
International Business Machines Corporation (IBM)
International Communications Association (ICA)
KIN Network Access Division
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
Mobile Marine Radio, Inc.
National Telephone Cooperative Association (NTCA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Pacific Telesis Group (PacTel)
RCI Long Distance, Inc. (RCI Long Distance)
Southwestern Bell Corporation
Sprint Communications Company L.P.
Tele-Communications Association (TCA)
Telecommunications Marketing Association
Telocator
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

Reply Comments

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Aeronautical Radio, Inc.
Alascom, Inc. (Alascom)
American Telephone and Telegraph Company (AT&T)
Ameritech Operating Companies (Ameritech)
Centel Cellular Corp.
Communications Transmission, Inc.
Competitive Telecommunications Association
Custom Network Services
First Financial Management Corporation (FFMC)
General Communication, Inc.
GTE Service Corporation (GTE)
Information Technology Association of America (ITAA)
International Communications Association (ICA)
LCI International Worldwide Telecommunications (LCI)
Local Area Telecommunications, Inc.
McCaw Cellular Communications
MCI Telecommunications Corp. (MCI)
Metropolitan Fiber Systems, Inc. (MFS)
National Telecommunications and Information Association (NTIA)
NYNEX Telephone Companies (NYNEX)
OCOM Corporation (OCOM)
Southwestern Bell Corporation
Sprint Communications Company L.P.
Telecommunications Marketing Association
Telocator
United States Telephone Association (USTA)
US West Communications, Inc. (US West)
Williams Telecommunications Group, Inc.

APPENDIX B: RULE CHANGES

Part 61 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 61 continues to read:

AUTHORITY: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. § 203.

2. Part 61 is amended by adding Section 61.50 as follows:

§ 61.50 Carriers Subject to Forbearance

Notwithstanding the rules set forth herein, no domestic carrier classified as nondominant that is subject to forbearance is required to file tariffs.

Supreme Court, U.S.
FILED
JUN 1 1993
OFFICE OF THE CLERK

No. 92-1684

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

MCI TELECOMMUNICATIONS CORPORATION,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
FEDERAL COMMUNICATIONS COMMISSION, and
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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AT&T's BRIEF IN OPPOSITION

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QUESTION RESTATED

Whether the D.C. Circuit correctly held that the Federal Communications Commission has no authority to "remove" the statutory requirement of 47 U.S.C. § 203 that all common carriers file their rates with the Commission and charge only the filed rate.

STATEMENT REQUIRED BY RULE 29.1

American Telephone and Telegraph Company ("AT&T") has no parent company. AT&T Technologies (formerly Western Electric Company), AT&T Capital Corporation (and its subsidiary AT&T Credit Corporation), and Teradata Corporation are subsidiaries of AT&T having outstanding debt in the hands of the public.

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On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

AT&T's BRIEF IN OPPOSITION

STATUTE INVOLVED

Petitioner MCI Telecommunications Corporation ("MCI") reproduces a portion of the relevant language from the applicable statute, Section 203 of the Communications Act of 1934, 47 U.S.C. § 203. The petition omits with an ellipsis, however, the most pertinent language of Section 203(c). The full text of Section 203(c) is set forth below, with the portion omitted by petitioner italicized:

> (c) Overcharges and rebates. No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chap-

> ter and with the regulations made thereunder; *and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.*

STATEMENT OF THE CASE

Petitioner MCI seeks review of a decision of the D.C. Circuit that does not conflict with any decision of this Court or any other court of appeals. To the contrary, that decision was compelled by this Court's decision in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), by prior court of appeals' decisions, and by the plain language of the statute it applied.

1. Section 203 of the Communications Act of 1934, 47 U.S.C. § 203, sets forth for telecommunications common carriers what has come to be known as the "filed rate" doctrine. That doctrine "prohibits a[ny] regulated entity from charging rates 'other than those properly filed with the appropriate federal regulatory authority.'" *Consolidated Edison Co.* v. *FERC*, 958 F.2d 429, 431 n.2, 432 (D.C. Cir. 1992) (citations omitted).

Sections 203(a) and 203(c) prescribe complementary obligations and prohibitions. Section 203(a) establishes the mandatory ratefiling obligations:

> Every common carrier . . . *shall* . . . file with the Commission and . . . keep open for public inspection schedules showing *all* charges for itself . . . and showing the classifications, practices, and regulations affecting such charges.

47 U.S.C. § 203(a) (emphasis added). Section 203(c) establishes the counterpart prohibitions against the provision of service at any rate other than that filed:

> [*N*]*o* carrier shall (1) charge, demand, collect, or receive *a greater or less or different compensation* for such communication, or for any service in connection therewith, between the points named in any such schedule *than the charges specified* in the schedule then in effect, or (2) *refund or remit* by any means or device *any portion of the charges so specified*, or (3) extend to any person any privileges or facilities in such communication, or employ or *enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.*

47 U.S.C. § 203(c) (emphasis added).

2. In the early 1980's, the FCC initiated a proceeding—known as *Competitive Carrier*—in which it addressed the scope of Section 203. In successive Reports in that proceeding, the FCC adopted a series of rules each applying different regulatory requirements to respondent American Telephone and Telegraph Co. ("AT&T") than to its competitors (whom it termed "nondominant carriers"). In particular, the FCC determined in its *Fourth Report* to "forbear" from "applying" to AT&T's competitors, including MCI, the ratefiling requirements of Section 203. The FCC acknowledged that the filing of rates was "a" congressionally-selected "means for the Commission to ensure the Act's objective of reasonable and not unjustly discriminatory rates." But the Commission concluded that, because of intervening events that Congress could not have foreseen, the "fundamental goals" of the Act would better be served by this new "forbearance" policy.[1]

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[1] *See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, CC Docket No. 79-252, Second Report and Order, 91 F.C.C.2d 59, 70-71

No party sought judicial review of those orders. In 1984, however, the FCC decided in its *Sixth Report* not only to "forbear" from "applying" the ratefiling requirement to non-dominant carriers, but affirmatively to prohibit such filings.[2] MCI petitioned for review of that rule. It contended that the *Sixth Report* was "in direct violation of Section 203 of the Communications Act, which provides that *every* common carrier *shall* file tariffs with the Commission."[3]

The D.C. Circuit agreed and vacated the *Sixth Report*. It held that Section 203's requirements that "every" common carrier "shall" file its rates, 47 U.S.C. 203(a), and that "no" common carrier "shall" charge any rates other than those so filed, impose mandatory obligations on common carriers that the agency has no power to waive. *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

The FCC argued in that appeal that its power to "modify" the requirements of Section 203 in "particular instances" or "special circumstances" under Section 203 (b)(2), 47 U.S.C. § 203(b)(2), permitted it to exempt carriers from the statutory filing requirements entirely. The court rejected that assertion. *Id.* at 1191-92. It noted that the FCC's position was inconsistent not only with the plain language of the statute, but with decisions of the Court of Appeals for the Second Circuit, *id.* at 1192 (citing *AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978), and *AT&T* v. *FCC*, 487 F.2d 865 (2d Cir.

(1982) (*"Second Report"*); *id.*, Fourth Report and Order, 95 F.C.C.2d 554 (1983) (*"Fourth Report"*).

[2] *See Policy and Rules Concerning Rates for Competitive Common Carrier Servs. and Facilities Authorizations Therefor*, CC Docket No. 79-252, Sixth Report and Order, 99 F.C.C.2d 1020 (1985) (*"Sixth Report"*).

[3] *MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Br. of MCI, p. 10 (Apr. 1, 1985) (emphasis in original).

1973)), and, until very recently, with decisions of the FCC itself. *Id.* at 1192-93 (citing *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1980)). Finally, the court stated that, in light of its holding vacating the *Sixth Report*, the FCC's earlier "forbearance" order could continue to stand, if at all, only as an exercise of the agency's enforcement discretion rather than as a rule that purported to eliminate the statutory ratefiling obligation. *Id.* at 1190-91 n.4.

Following this decision, the FCC filed a brief in a related case in the D.C. Circuit in which it characterized the *Fourth Report*. It stated that the "forbearance" policy of the *Fourth Report* was an exercise of its enforcement discretion that had no effect on Section 203's "unalterable command" that all carriers file all their rates:

> "[W]hether or not Section 203 is read as an unalterable command that carriers file tariffs with the FCC, the decision of the FCC not to enforce that statute . . . is an exercise of [its] enforcement discretion and presumptively unreviewable.[4]

See Pet. 13a.

3. Notwithstanding the 1985 decision of the court of appeals, MCI began in mid-1987 to violate Section 203 by refusing to file rates for many of its services. When it learned of this practice, AT&T filed a complaint with the FCC under Section 208 of the Act, 47 U.S.C. § 208,

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[4] *MCI Telecommunications Corp.* v. *FCC*, No. 84-1402 (D.C. Cir.), Br. of FCC, p. 27 (Dec. 26, 1985). Contrary to MCI's misstatement (Pet. 6 n.1), the brief that AT&T filed in this case did not "concede" or "defend" the suggestion that the FCC has the authority to remove the statutory ratefiling requirement. To the contrary, AT&T argued that the FCC's forbearance policy could be defended as having "merely indicated that the Commission would not take enforcement action." *MCI Telecommunications Corp.* v. *FCC*, No. 84-1402 (D.C. Cir.), Br. of AT&T, p. 41 (Jan. 9, 1986). That was the position that MCI and the FCC had taken, and would later abandon.

challenging MCI's violation of its statutory obligations. AT&T explained that this conduct enabled MCI to obtain a substantial and unlawful competitive advantage: it could match or undercut AT&T's published rates, while AT&T was "unable to match [its] competitors' unknown prices." *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). AT&T sought a cease and desist order to bring MCI into compliance with the law, and damages for the competitive injuries caused by MCI's violations.

In response to this complaint, MCI admitted that it was not filing rates for many of its services. It attempted to defend this conduct by making an extraordinary "about-face" with respect to the legal position it had *successfully* asserted before the court of appeals in 1985. Thus, although MCI had previously asserted that the *Fourth Report* was merely an exercise of the FCC's enforcement discretion that had no effect on its independent obligations under Section 203, MCI now claimed that the *Fourth Report* exempted it from those obligations *in toto*.[5] And although MCI had previously claimed that any such attempt by the FCC would be unlawful in light of the unmistakably mandatory language of Section 203, it now claimed that the FCC had the authority to waive a carrier's compliance with that statutory obligation.[6]

Ten months after AT&T's complaint had been filed (during which time the FCC took no action to resolve it), this Court decided *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and eliminated

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[5] *Compare MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Reply Br. of MCI, pp. 27-28 (May 15, 1985) *with* MCI Answer, *AT&T* v. *MCI*, FCC File No. E-89-297 (filed Sept. 19, 1989), pp. 5-6.

[6] *Compare MCI Telecommunications Corp.* v. *FCC*, No. 85-1030 (D.C. Cir.), Br. of MCI, p. 8 (Apr. 1, 1985) *with* MCI Answer, *AT&T* v. *MCI*, FCC File No. E-89-297 (filed Sept. 19, 1989), pp. 5-6.

any possibility that the FCC might have the authority that MCI claimed. The Court in *Maislin* construed the statutory filing requirements of the Interstate Commerce Act that are the model for Section 203. *Maislin* held that these requirements bind all carriers; that the provision of services at secret, unfiled rates constitutes the unlawful price discrimination that these ratefiling requirements were designed to prevent; and that the Interstate Commerce Commission could not authorize the provision of services at rates lower than the filed rates. *Id.* at 130-35.

The FCC was statutorily required to resolve AT&T's complaint within a year of the complaint's filing. 47 U.S.C. § 208(b)(1). When two and a half years had passed with no agency action, AT&T filed a petition for mandamus with the court of appeals asking the court to direct the FCC to act. The FCC responded by representing that it would rule on AT&T's complaint within 30 days.[7] Based on that representation, the court denied the petition.

4. Approximately 30 days later, the FCC issued its decision denying and dismissing AT&T's complaint. Pet. 20a. That decision stated, for the first time since *MCI* v. *FCC* was decided seven years earlier, that the FCC's forbearance policy was not, after all, "merely an exercise of the Commission's prosecutorial discretion." Rather, the Commission announced it was a "binding substantive rule" that purported to have "removed" the ratefiling requirement. Pet. 27a.

The FCC nevertheless "declined to decide forthrightly" whether such a rule could be lawful in light of *Maislin* and *MCI* v. *FCC*. Pet. 7a. The FCC instead dismissed AT&T's request for a cease and desist order on the ground that it intended to reexamine the lawfulness of

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[7] *In re AT&T*, No. 91-1487 (D.C. Cir.), Response of FCC to AT&T's Petition for a Writ of Mandamus (Dec. 18, 1991).

its forbearance policy in a future rulemaking (Pet. 27a-28a). And it denied AT&T's request for damages on the ground that it would be "unfair" to find MCI liable for its statutory violations when MCI had acted consistently with the FCC's policy (Pet. 26a-27a). Thus, the FCC purported to authorize MCI to continue to violate Section 203, with immunity from damages, at least until the FCC completed a new rulemaking. *See* Pet. 14a.

AT&T petitioned for review, and the court of appeals granted its petition. The court had "little difficulty in concluding" that the FCC's action was arbitrary and capricious. Pet. 12a. It held that the FCC has a statutory obligation under Sections 206-208 of the Communications Act, 47 U.S.C. §§ 206-208, to adjudicate complaints "under the law currently applicable," and that the FCC had failed to do so. Pet. 9a. The court attributed the FCC's "troubling tactics" to an "obvious strategy" of trying to "keep the [forbearance] rule in effect for as long as possible despite serious doubts that the rule could not withstand judicial review." *Id.* at 12a. It then held, in reliance on *MCI* v. *FCC* and *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), that the rule was "plainly contrary to Section 203." Pet. 3a. The court observed that the FCC "will have to obtain congressional sanction for its desired policy course." *Id.* at 18a. The case was remanded for the FCC to reconsider AT&T's claims for relief without reliance on its unlawful rule.

5. Approximately one week before the court of appeals issued *AT&T* v. *FCC*, the FCC adopted its Report and Order in the rulemaking proceeding. Pet. 33a. The FCC reiterated its position that Section 203(b) granted it authority to remove the statutory ratefiling requirement. Pet. 42a-51a. It also concluded that Congress had "acquiesced" in this interpretation by failing to enact legislation disapproving it. Pet. 51a-55a.

AT&T has filed a petition for review of the Report and Order, and a motion for summary decision, in the D.C. Circuit. That petition and motion remain pending.

REASONS FOR DENYING THE WRIT

The D.C. Circuit's decision does not present any question that warrants review by this Court. It reaffirms the longstanding "filed rate" doctrine, holding that the rate-filing requirements of the Communications Act are mandatory and that only Congress, and not the FCC, can "remove" them. That holding is compelled by this Court's decision three years ago in *Maislin Industries U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); it is consistent with every other court of appeals' decision to address the issue; and it is plainly a correct reading of the statute.

The administrative law issue raised separately in MCI's petition is equally uncertworthy. MCI is simply wrong in suggesting that the decision below impinged upon the traditional discretion of an agency to choose between rulemaking and adjudication in making policy. The FCC always had the option to decide this statutory issue through rulemaking; it declined for years to exercise that option, and instead elected to create the first reviewable order on the issue by deciding AT&T's complaint in advance of the rulemaking.

I. CONSISTENT WITH EVERY OTHER FEDERAL COURT DECISION ON THE SUBJECT, THE D.C. CIRCUIT CORRECTLY REAFFIRMED THE FILED RATE DOCTRINE IN HOLDING THAT THE FCC LACKS AUTHORITY TO "REMOVE" THE RATE-FILING REQUIREMENT OF SECTION 203.

The court of appeals' holding that the statutory rate-filing requirement is mandatory, and cannot be "removed" by the FCC, presents no conflict with any decision of this Court or any other court. To the contrary, it is consistent with every decision addressing the issue.

This Court expressly reaffirmed this principle in 1990, when it decided in *Maislin* that the Interstate Commerce Commission ("ICC") could not exempt carriers from their statutory obligation to offer service pursuant to tariffed rates.[8] The Communications Act embodies filed rate, non-discrimination, and agency modification provisions that were taken directly from the provisions of the Interstate Commerce Act ("ICA").[9] Indeed, the rate-filing requirements in the two statutes are worded indistinguishably.[10]

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[8] This ruling in *Maislin* was in turn reaffirmed by this Court in *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993).

[9] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communication companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective"); *see also* 73 Cong. Rec. 10313 (1934) (statement of Rep. Rayburn) (ICA Section 6 as basis of Communications Act Section 203); 73 Cong. Rec. 8823 (1934) (statement of Sen. Dill). *See generally American Broadcasting Cos.* v. *FCC*, 643 F.2d 818, 820-21 (D.C. Cir. 1980); *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973).

[10] *Compare* 47 U.S.C. § 203(a) (Communications Act tariff filing requirement) *with* 49 U.S.C. § 6(1) (original ICA tariff filing requirement) *and* 49 U.S.C. § 10762(a) (recodified ICA tariff filing requirement). *Compare* 47 U.S.C. § 203(b)(2) (Communications Act authorization for particular agency modification of requirements) *with* 49 U.S.C. § 6(3) (original ICA agency authorization provision) *and* 49 U.S.C. § 10762(d)(1) (recodified ICA agency authorization provision). *Compare* 47 U.S.C. § 203(c) (first clause, Communications Act prohibition of service in absence of filed tariffs) *with* 49 U.S.C. § 6(7) (original ICA prohibition against service without filing rates) *and* 49 U.S.C. § 10761(a) (recodified ICA prohibition against service without filing rates). *Compare* 47 U.S.C. § 203(c) (second clause, Communications Act prohibition of rebates or service at other than filed rates) *with* 49 U.S.C. § 6(7) (original ICA anti-rebate provision) *and* 49 U.S.C. § 10761 (recodified ICA anti-rebate provision).

In *Maislin*, this Court construed that language. It held that none of the broad delegations of agency power in the statute empowered the ICC to permit provision of service at unfiled rates. "For a century," the Court explained, it had repeatedly interpreted the statute's tariff filing and non-discrimination provisions as barring carriers' provision of service at unfiled rates, *id.* at 130, and the agency could not depart from this interpretation. *Id.* at 130-36. The Court specifically rejected the agency's assertion that increased competition justified allowing carriers to charge unfiled rates: "exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements." *Id.* at 135.

The Court further held that allowing carriers to charge rates not contained in tariffs would eviscerate the statutory nondiscrimination requirements contained in both the ICA and the Communications Act. The Court reasoned that charging secret unfiled rates that are below the filed rate is a *per se* violation of the counterparts to Section 202(a) as well as Section 203, and that "compliance with [the tariff filing requirements] is 'utterly central' to the administration of the Act." *Id.* at 132 (quoting *Regular Common Carrier Conference* v. *United States*, 793 F.2d 376, 379 (D.C. Cir. 1986) (Scalia, J.)). The Court explained:

> "[T]he [ICC's] . . . policy, by sanctioning adherence to unfiled rates, undermines the basic structure of the Act. The ICC cannot review in advance the reasonableness of *unfiled* rates. Likewise, other shippers cannot know if they should challenge a carrier's rates as discriminatory when many of the carrier's rates are privately negotiated and never disclosed to the ICC."

Id. (emphasis in original). The FCC's policy is, if anything, in even greater tension with the Act because it allows every common carrier in the industry (except

AT&T and local exchange companies) to offer service at unfiled rates.

MCI's principal argument is that certiorari should be granted because the court of appeals purportedly misapplied *Chevron USA Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet. 15-22. However, MCI does not (and cannot) claim that the court of appeals adopted any new interpretation or holding relating to *Chevron*. MCI simply argues that the court did not give the FCC's interpretation of its authority as much deference as MCI believes it should have. That issue is manifestly uncertworthy.

In any event, the decision below is entirely consistent with the principles set forth by this Court for reviewing agency interpretations of statutes. Indeed, the court of appeals simply followed the principles reaffirmed in *Maislin*, which itself addressed the proper application of *Chevron* in this context. 497 U.S. at 131. This Court in *Maislin* explained that it had previously concluded, in decision after decision, that the requirements of the filed rate doctrine were congressionally mandated and could not be waived or excused by an administrative agency. *Maislin*, 497 U.S. at 130-31. The Court then set forth the framework for review of agency action in such circumstances: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Id.* at 131; *see also Lechmere, Inc.* v. *NLRB*, 112 S. Ct. 841, 847-48 (1992). The court of appeals in this case properly adhered to that approach.

Nor is there any conflict among the courts of appeals on this issue. Those courts have uniformly construed the filed rate requirements and Section 203(b) of the Communications Act as not empowering the FCC to allow carriers to offer services at unfiled rates. Like the

D.C. Circuit, the Second Circuit has surveyed the text and legislative history of Section 203(b) (which it noted was derived directly from the Interstate Commerce Act) and concluded that "under Section 203(b) the Commission may only modify requirements as to the form of, and information contained in, tariffs and the thirty days notice provision." *AT&T* v. *FCC*, 487 F.2d 865, 879 (2d Cir. 1973); *see also AT&T* v. *FCC*, 572 F.2d 17, 25 (2d Cir. 1978) (setting forth Section 203(a)'s tariff filing requirement and stating that "[w]e are aware of no authority for the proposition that the FCC may abdicate its responsibility to perform these duties and ensure that these statutory standards are met").

Indeed, until very recently this was the FCC's understanding as well. Shortly after the FCC initiated its *Competitive Carrier* proceeding, it stated that there was "no question" that tariffs are "essential to the entire administrative scheme of the Act." *Western Union Tel. Co.*, 75 F.C.C.2d 461, 474 (1980). It explained that "[t]he importance of tariffs and the requirement that common carriers—*all common carriers*—must file all of their communications services to the public through published tariffs is well established." *Id.* (emphasis added). Moreover, that was the position the FCC argued to the Second Circuit, when it explained that "[t]he Commission has affirmative commands from Congress to ensure . . . that rates and practices are set forth in tariffs filed with the FCC," and "[t]he agency has no authority to ignore these commands, even if market forces are present which undercut the 'natural monopoly' justification for regulation." *AT&T* v. *FCC*, 572 F.2d 17 (2d Cir. 1978), Brief of FCC, pp. 49-50 (quoted in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985)).

The plain meaning of Section 203 confirms that the courts of appeals' uniform interpretation, and the FCC's previous interpretation, of Section 203(b) is compelled. First, Section 203(b) authorizes the FCC only to "mod-

ify," rather than to eliminate or abandon, the tariff filing requirement at the heart of the Act. *See MCI Telecommunications Corp.* v. *FCC*, 765 F.2d at 1192 (quoting *Black's Law Dictionary* 905 (5th ed. 1979): " 'modify' defined as '[t]o alter; to change in incidental or subordinate features; enlarge, extend; amend; limit, reduce' ").[11] Second and more fundamentally, even the FCC's power to modify is limited to "special circumstances or conditions." 47 U.S.C. § 203(b)(2). The FCC's forbearance policy, in contrast, makes avoidance of the tariff filing requirement the general rule applicable to hundreds of carriers, and leaves the Act's central filing requirements applicable only to a handful, including AT&T.

Section 203(c) confirms that the FCC's modification power does not extend to allowing carriers to offer services at unfiled rates. The first clause of Section 203(c) requires that tariffs be filed in accordance with provisions governing their form and content, "unless otherwise provided by or under authority of this chapter." MCI relies on this clause to argue that the FCC has sweeping authority under Section 203(b) to eliminate the requirements of Section 203(a) and 203(c). Pet. 19. But MCI totally fails to mention Section 203(c)'s second clause, which prohibits charging rates other than those filed in tariffs. This clause is unqualified and not similarly subject to the FCC's modification power.[12]

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[11] For example, Section 203(b) may authorize the FCC to forego *federal* tariffing in those cases where it chooses to defer to state regulation and state tariffing requirements that would not otherwise interfere with the objectives of the Communications Act. *Compare Diamond International Corp.* v. *FCC*, 627 F.2d 489 (D.C. Cir. 1980) *with New York Telephone* v. *FCC*, 631 F.2d 1059 (2d Cir. 1980).

[12] In any event, the reference in the first clause of Section 203(c) to exceptions "otherwise provided by or under authority of this chapter" does not suggest that the FCC has an otherwise unstated authority to waive Section 203. That clause refers to

Finally, MCI adopts the FCC's contention, advanced in its separate rulemaking decision, that Congress through the Telephone Operator Consumer Services Improvement Act (TOCSIA), P.L. 101-435 (codified at 47 U.S.C. § 226), "acquiesced in the FCC's present forbearance rules." *Tariff Filing Requirements for Interstate Common Carriers*, CC Docket No. 92-13, *Report and Order*, 7 FCC Rcd. 8072, 8077 (1992). This argument is insubstantial. "[T]he doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpreting ambiguous statutory provisions." *Jones* v. *Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947).[13] Here, the statute—Section 203—is unambiguous, and Congress cannot silently "acquiesce" in an interpretation contrary to its plain meaning.

In any event, TOCSIA specifically disclaims any such intent or effect. It was enacted to address widespread complaints associated with a narrow segment of the industry—operator service providers. TOCSIA specifically provides—in a provision entitled "Statutory construction" that MCI does not even discuss—that "[n]othing in this section shall be construed to alter the obligations, powers, or duties of common carriers or the Commission under the other sections of this chapter." 47 U.S.C. § 226(i). Because Section 203 is one of the "other sections of this chapter," TOCSIA cannot be read to alter the historic understanding of that section's mandatory ratefiling requirements.[14]

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other provisions of the Act that provide for limited and explicit statutory exceptions to the filing requirements. *See* 47 U.S.C. § 211(b) (expressly authorizing the FCC to "exempt" carriers from submitting copies of "minor contracts").

[13] *See also Arkansas Best Corp.* v. *Commissioner*, 485 U.S. 212, 222 n.7 (1988); *SEC* v. *Sloan*, 436 U.S. 103, 121 (1978); *TVA* v. *Hill*, 437 U.S. 153, 173 (1978).

[14] Contrary to MCI's argument, Pet. 20-21, TOCSIA's requirement that operator service providers file "informational tariffs"

II. THIS CASE DOES NOT PRESENT ANY ISSUES CONCERNING AN AGENCY'S "DISCRETION TO CHOOSE BETWEEN RULEMAKING AND ADJUDICATION."

MCI also contends that the court of appeals' decision impermissibly impinges upon the "traditional discretion of agencies to choose between rulemaking and adjudication." Pet. 23-29. This argument ignores the facts of the case.

The FCC was statutorily obligated to resolve AT&T's complaint in an adjudication. *See* 47 U.S.C. § 208. In any event, however, the FCC has always been able to resolve in a rulemaking proceeding any issues concerning the lawfulness of its forbearance rules. Indeed, once the court of appeals vacated the *Sixth Report* in *MCI* v. *FCC*, the responsible course of action for the FCC would have been to initiate such a proceeding immediately and apply the controlling principles established by the new proceeding. Instead, the FCC simply permitted its forbearance policy to remain in effect for years without reexamination, while taking inconsistent positions on what that rule required—first maintaining that the policy was merely an exercise of its enforcement discretion, and then characterizing the policy as having "removed" the statutory ratefiling requirements. *See supra* pp. 5, 7; *see also* Pet. 13a n.7. The Commission evidently elected to pursue this course of action out of a "desire to keep the rule in effect as long as possible despite serious doubt that the rule could not withstand judicial review." Pet. 12a.

Nor did the filing of AT&T's complaint deprive the FCC of any of its "traditional discretion" to choose be-

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does not become "redundant" if Section 203 is given effect. Section 203 applies only to "common carriers." TOCSIA's tariffing requirement applies more broadly to non-common carriers as well. 47 U.S.C. § 226(a)(9). Those informational tariffs, moreover, are required to contain substantial data that Section 203 does not require be filed, such as amounts of commissions and estimates of traffic volume. 47 U.S.C. § 226(h)(1)(A).

tween rulemaking and adjudication. As the court of appeals noted, "nothing stopped the FCC from initiating a companion rulemaking when AT&T filed its complaint." Pet. 10a. The statutory deadline for resolving complaint proceedings grants the FCC one year. 47 U.S.C. § 208 (b)(1). The rulemaking that the FCC was ultimately forced to initiate, after a two and half year delay and the filing of a mandamus petition, took substantially less time than that to conclude. The FCC could have held AT&T's complaint in abeyance while it proceeded with the rulemaking, completed the rulemaking in less than a year, and then resolved the complaint in accordance with the result of the rulemaking. It declined to do so only because that course would have produced a reviewable order on a matter the FCC preferred to delay.

The court of appeals did no more in this case than apply settled principles of administrative law. When the FCC acts in an adjudication, it is obligated to "decide the complaint under the law currently applicable." Pet. 9a. The final agency action produces a reviewable order, and it is well-established that the lawfulness of a rule can be challenged on appeal of an adjudication applying that rule. *See, e.g., Functional Music, Inc.* v. *FCC*, 274 F.2d 543 (D.C. Cir. 1958); *Commonwealth Edison Co.* v. *NRC*, 830 F.2d 610 (7th Cir. 1987); *Texas* v. *United States*, 730 F.2d 409 (5th Cir. 1984), *amended on reh'g*, 749 F.2d 1144 (5th Cir. 1985); *Tri-State Motor Trans. Co.* v. *ICC*, 739 F.2d 1373, 1375 & n.2 (8th Cir. 1984).

MCI's petition ultimately turns on a factual mischaracterization of the Order under review—the claim that the Order never applied the FCC's rule (Pet. 12). As the court of appeals recognized, however, the agency in this case applied the FCC's rule to deny AT&T relief, and that rule is unlawful. Pet. 14a. The FCC's Order made clear that it understood the forbearance policy to have "remov[ed]" the statutory ratefiling requirement and that that understanding was "effective" prospectively—unless

and until the FCC reached a different decision in its rulemaking proceeding. Pet. 28a. The FCC's Order thus purported to authorize MCI to continue to violate Section 203, with immunity from damages, for at least that interim prospective period. The FCC lacked the statutory authority to take such action, and its Order was properly set aside.

Finally, MCI suggests inconsistently that, far from having discretion to choose between rulemaking and adjudication, the FCC was *obligated* to apply an unlawful rule to AT&T's complaint, and to any other matters that arose, unless and until it repealed that rule in another rulemaking proceeding. Pet. 24-26. This issue is not properly presented by the FCC Order on review in this case. The FCC's position in that Order was that it had the discretion, not the obligation, to deny AT&T's complaint and proceed through a rulemaking. Pet. 28a.

In any event, this Court has never held that an agency is required to apply an unlawful rule, or that a reviewing court is obliged to uphold such action. To the contrary:

> [W]hile agencies are bound by those regulations that are issued within the scope of their lawful discretion . . . they cannot be bound by regulations contrary to law. Otherwise, the [agency] would effectively be empowered to repeal statutes that the Congress enacts.

United States v. *Burke*, 112 S. Ct. 1867, 1876-77 (1992) (Scalia, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER TERM, 1992

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Federal Communications Commission may permit certain telephone companies to provide interstate service without filing tariffs.

2. Whether, in considering a complaint filed by one telephone company seeking damages and injunctive relief against another telephone company that had not filed tariffs, as permitted by the applicable FCC rule, the FCC had authority to deny the damages claim on equitable grounds and to dismiss the claim for injunctive relief while initiating a rulemaking proceeding to reconsider the challenged rule.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1684

MCI TELECOMMUNICATIONS CORPORATION, PETITIONER

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 978 F.2d 727. The opinion of the Federal Communications Commission (Pet. App. 20a-30a) is reported at 7 F.C.C. Rcd. 807.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 1992. Petitions for rehearing were denied on January 21, 1993. Pet. App. 31a, 32a. The petition for a writ of certiorari was filed on April 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Subsection (a) of Section 203 of the Communications Act of 1934 requires telephone companies to file tariff schedules with the FCC listing the interstate services they offer and the rates they charge for those services. 47 U.S.C. 203(a). Subsection (b)(2) of that same Section authorizes the FCC to "modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions," with the single exception that the FCC may not require notice of "more than one hundred and twenty days" before a tariff takes effect. 47 U.S.C. 203(b)(2) (Supp. III 1991). Subsection (c) states that carriers may not offer service except under tariff schedules "unless otherwise provided by or under authority" of the Communications Act. 47 U.S.C. 203(c). Other Sections of the Act require that rates be just and reasonable (Section 201(b)) and not unreasonably discriminatory (Section 202(a)); authorize the FCC to suspend, investigate, and prescribe rates, and in some circumstances to order refunds (Sections 204, 205); and permit the filing of complaints with the FCC, which has authority to investigate "in such manner and by such means as it shall deem proper," and to require carriers to pay damages or to cease and desist from unlawful conduct (Sections 207-209).

In a series of orders under the *Competitive Carrier* rulemaking proceeding, the FCC in 1979 began to adopt rules reducing, in increments, the requirements imposed on telephone companies lacking market power. By 1983, the Commission had relieved most "non-dominant" carriers such as peti-

tioner MCI Telecommunications Corp. of the general obligation to file tariffs. See *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983). However, non-dominant carriers remained (and still remain) subject to the substantive requirements that their rates be just and reasonable and not unreasonably discriminatory. The *Fourth Report* adopted rules that permitted but did not require non-dominant carriers to forbear from filing tariffs—a policy sometimes called "permissive detariffing." The *Fourth Report* was not challenged directly on judicial review.

A subsequent order in the *Competitive Carrier* proceeding made the detariffing of non-dominant carriers mandatory: Under the rules adopted in that order, such carriers no longer were *permitted* to file tariffs with the FCC. See *Sixth Report and Order*, 99 F.C.C. 2d 1020 (1985). MCI challenged the *Sixth Report* in the D.C. Circuit and won a ruling that the FCC lacked authority "to prohibit MCI and similarly situated common carriers from filing tariffs." *MCI Telecomm. Corp.* v. *FCC*, 765 F.2d 1186, 1188 (D.C. Cir. 1985). In rejecting the FCC's argument that MCI's petition was an untimely challenge to rules and policies adopted in the *Fourth Report*, the court said that the mandatory detariffing rules "fundamentally altered" the earlier permissive detariffing program. 765 F.2d at 1190. The court declined to reach the question "whether the FCC's earlier permissive orders are invalid," *id.* at 1196, even though that question had been raised in the briefs.

Although respondent AT&T had initially raised statutory objections to detariffing, see *Second Report and Order*, 91 F.C.C. 2d 59, 64 (1982), throughout the *Competitive Carrier* proceeding AT&T primarily

objected to what it perceived as unfair asymmetrical regulatory treatment of dominant and non-dominant carriers. See, *e.g.*, *First Report and Order*, 85 F.C.C. 2d 1, 17-18 (1980); *Second Report and Order*, 91 F.C.C. 2d at 63 n.13, 64; *Fifth Report and Order*, 98 F.C.C. 2d 1191, 1193 (1984). AT&T never sought judicial review of any of the *Competitive Carrier* orders. And ultimately, both before and after the D.C. Circuit's decision in *MCI Telecommunications Corp.* v. *FCC*, 765 F.2d 1186 (1985) AT&T argued before the FCC and in court that the Commission had authority under Section 203 to remove the requirement that carriers file interstate tariffs. See *Sixth Report and Order*, 99 F.C.C. 2d at 1027; *MCI Telecommunications Corp.* v. *FCC*, No. 84-1402 (D.C. Cir.), AT&T Br. at 41-42 (filed Jan. 9, 1986).

2. On August 7, 1989, AT&T filed this adjudicatory proceeding in which it objected to the FCC's permissive detariffing policy. AT&T's complaint to the FCC alleged that "MCI has provided and continues to provide interstate common carrier services to selected customers at rates, and upon terms and conditions, that are not specified in MCI's tariffs." Letter, dated August 7, 1989, from Francine Berry, AT&T, to Secretary of FCC, at 1 ("Berry Letter"). AT&T acknowledged that the Commission, in the *Competitive Carrier* proceeding, had "adopted rules * * * purport[ing] to make optional the filing of tariffs by 'nondominant' carriers." Berry Letter at 1. AT&T complained, however, that "[t]he Commission's regulatory reforms ha[d] not kept pace" with interexchange competition, and stated that its complaint challenged the permissive detariffing policy as incon-

sistent with Section 203, which it read as requiring the filing of tariffs. Berry Letter at 1-2.

Protracted discovery disputes between AT&T and MCI began in the Fall of 1989 and continued into the following summer. By that time, the Commission had initiated a separate rulemaking proceeding to reassess the state of interexchange competition and to determine, among other things, whether AT&T, like MCI and others, should be treated as a "non-dominant" carrier. *Competition in the Interstate Interexchange Marketplace* (CC Docket No. 90-132), Notice of Proposed Rulemaking 5 F.C.C. Rcd. 2627, 2649 (Apr. 13, 1990). The FCC believed that the outcome of the new rulemaking might have a bearing on AT&T's complaint, since AT&T's comments in the *Interexchange Competition* rulemaking urged the FCC to classify AT&T as a non-dominant carrier (Comments of AT&T in Docket 90-132, at iv, viii, 7 (filed July 3, 1990)), and the Berry Letter (at 1-2) had explained that AT&T's "fundamental" reason for filing the complaint against MCI was its dissatisfaction with the asymmetrical regulation of dominant and non-dominant carriers and the pace of further regulatory reforms. In addition, in order to coordinate the two proceedings effectively, the Commission transferred responsibility for the complaint proceeding from the Common Carrier Bureau's Enforcement Division to its Policy and Program Planning Division, which had responsibility for the *Interexchange Competition* proceeding. See Letter dated July 3, 1990, from Greg Weiss, Enforcement Division, to AT&T and MCI. The Commission did not act on the complaint while the *Interexchange Competition* proceeding went forward.

On September 16, 1991, the Commission released its decision in the *Interexchange Competition* proceeding. *Report and Order* (CC Docket No. 90-132), 6 F.C.C. Rcd. 5880 (1991). Although the Commission in that order gave AT&T some additional regulatory flexibility in light of competitive developments in the interexchange market, it did not place AT&T in precisely the same regulatory status as its non-dominant rivals. 6 F.C.C. Rcd. at 5894-5908. In particular, the Commission did not extend its permissive detariffing rules to AT&T. 6 F.C.C. Rcd. at 5897.

AT&T responded almost immediately by filing a petition for a writ of mandamus asking the D.C. Circuit to compel the FCC to act favorably on its complaint against MCI. See AT&T Petition for Writ of Mandamus to the Federal Communications Commission, D.C. Circuit No. 91-1487, at 13-18 (filed Oct. 4, 1991). After calling for a response by the Commission, the court of appeals denied the petition in light of the Commission's commitment to act on the complaint by January 31, 1992. *Order*, D.C. Circuit No. 91-1487, (filed Jan. 24, 1992). On January 28, 1992, the Commission released the *Order* on review and a related *Notice of Proposed Rulemaking* proposing to consider again its permissive detariffing rules. *Tariff NPRM*, 7 F.C.C. Rcd. 804 (1992).

In the *Order* at issue, the Commission denied AT&T's complaint insofar as AT&T sought damages for MCI's failure to file tariffs in the past, and the FCC dismissed the complaint insofar as AT&T sought injunctive relief requiring MCI to file tariffs in the future. Pet. App. 26a. With respect to AT&T's damages claim, the Commission concluded that "it would be manifestly unfair to entertain AT&T's claim

that MCI's alleged past conduct, which the Commission [had] explicitly approved in advance, may give rise to a finding of liability." *Id.* at 27a. With respect to AT&T's request for injunctive relief, the Commission noted that, although agencies have broad discretion to make policy via either rulemakings or adjudications, "rulemaking proceedings are more appropriate for considering general rules of widespread applicability." *Id.* at 28a. In this case, the Commission determined, AT&T was "in practical effect" challenging its permissive detariffing rules—rules constituting "one of the cornerstones of our regulation of the [competitive] long-distance industry." *Ibid.* The FCC concluded, under those circumstances, that it would be inappropriate "to consider a modification or repeal of [permissive detariffing], with so potentially widespread an impact, in the context of a two-party adjudicatory proceeding, as opposed to a rulemaking proceeding." *Ibid.* Simultaneously with its dismissal of AT&T's prayer for prospective relief, the Commission initiated a notice and comment rulemaking, with an expedited pleading cycle, to consider whether its permissive detariffing rules should be modified or repealed. *Tariff NPRM*, 7 F.C.C. Rcd. 804 (1992); see Pet. App. 29a-30a.

3. The FCC completed its expedited rulemaking proceeding with a vote at a public meeting on November 5, 1992, while this case was pending in the D.C. Circuit. AT&T and the FCC apprised the court promptly of the Commission's action, and AT&T sent the court a copy of the Commission's news report announcing the vote by letter dated November 5. The Commission released the text of its rulemaking decision on November 25. *Rulemaking Order*, 7

F.C.C. Rcd. 8072 (1992). The *Rulemaking Order* retained the permissive detariffing rules and set forth a comprehensive analysis of the Commission's justification for those rules, including a discussion of significant congressional action since the adoption of the rules that indicated acquiescence or ratification. AT&T filed a petition for review of the *Rulemaking Order*, and that proceeding is pending in the D.C. Circuit. D.C. Circuit No. 92-1628.

4. On November 13, 1992—eight days after the FCC announced the completion of the expedited rulemaking proceeding—the D.C. Circuit issued its judgment in this case. The court of appeals first held that "it was arbitrary and capricious for the Commission to dismiss AT&T's complaint" against MCI without deciding whether permissive detariffing is contrary to Section 203 of the Communications Act, as AT&T alleged. Pet. App. 12a. Although the court acknowledged that agencies such as the FCC generally have "a fundamental choice" whether to proceed by adjudication or rulemaking, it held that such a choice was not available here because the agency's "responsibilities as an adjudicator" required it to resolve AT&T's complaint on the merits. *Id.* at 9a. The court of appeals characterized the FCC's choice to proceed by rulemaking as "a sort of administrative law shell game" designed "to avoid judicial review of the rule." *Id.* at 8a. The court did not mention the FCC's commitment at the September 1992 oral argument to resolve the rulemaking proceeding by November 1992, or that the FCC had completed its rulemaking proceeding before the court issued its judgment.

Having found the FCC's *Order* to be an arbitrary and capricious disposition of AT&T's complaint, the court next refused to remand the substantive issue concerning the validity of the permissive detariffing policy to the FCC or to defer a ruling on that issue to a proceeding on review of the FCC's rulemaking decision. In declining to remand the issue, the court of appeals stated (1) that a remand would "allow the FCC's troubling tactics" of delay to succeed (Pet. App. 12a); (2) that a remand was not necessary, in light of the D.C. Circuit's 1985 opinion in *MCI* v. *FCC*, which "virtually settles the issue" (Pet. App. 13a); and (3) that the validity of the permissive rules was before the court in this case, because the FCC "necessarily relied on the *Fourth Report* in its decision to dismiss AT&T's complaint" (*ibid.*). The court thus proceeded to consider the merits of the permissive detariffing rules established by the FCC in 1983 in the *Fourth Report*.

Reading *MCI* v. *FCC* as reserving judgment on the validity of the permissive detariffing policy only as an exercise of prosecutorial discretion, the court held that "[a]s a substantive rule, the *Fourth Report* is simply not defensible in this court." Pet. App. 16a. The court of appeals noted that the FCC had relied on Section 203(b), the provision authorizing the FCC to "modify any requirement" of the Communications Act, in adopting the permissive detariffing policy, and conceded that the argument that Section 203(b) authorizes the FCC to modify the tariffing requirement "was not insubstantial when made initially." Pet. App. 16a. The court also acknowledged that the 1985 opinion in *MCI* v. *FCC*—which it apparently interpreted as having rejected the "not insubstantial"

argument of the agency interpreting its own organic Act—had not cited *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), even though *Chevron* had been decided first. Pet. App. 16a n.11. The court of appeals remanded the case to the FCC for further proceedings consistent with the court's opinion. *Id.* at 19a.

The FCC and MCI filed petitions for rehearing and suggestions of rehearing en banc. The FCC suggested that the en banc court hear this case in conjunction with the separate proceeding in which AT&T had sought review of the November 1992 *Rulemaking Order* that reaffirmed the permissive detariffing policy. In such a proceeding, the Commission suggested, the en banc court would have an opportunity to review the FCC's rules on the basis of factors that necessarily were not considered when the panel elected to review those rules solely "on the basis of the reasoning offered when the rule was originally promulgated." Pet. App. 15a. In particular, the Commission pointed out that its *Rulemaking Order* had relied on more than ten years of congressional acquiescence in its permissive detariffing rules and on subsequent legislative action that made no sense in the absence of such rules and thus constituted a ratification of the permissive detariffing policy. The court of appeals denied rehearing.

ARGUMENT

MCI's petition for a writ of certiorari should be denied. The first question presented—concerning the merits of the Commission's permissive detariffing policy—involves a matter of substantial importance, but review of the validity of that policy would be

premature. The second question presented, involving the D.C. Circuit's erroneous procedural rulings, does not raise an issue of general importance warranting review by this Court.

1. The court of appeals' rejection of the Commission's permissive detariffing rules is a matter of substantial concern. As the Commission noted in ruling on AT&T's complaint, the rules represent a "cornerstone" of its regulation of the long-distance industry, and their removal is likely to have an adverse and anticompetitive impact on many providers of telecommunications services and their customers. Pet. App. 28a, 59a-61a. Nevertheless, review in this case would be premature.

It was precisely for the purpose of examining fully the economic and legal bases for the permissive detariffing rules that the Commission conducted the extensive rulemaking that culminated in the *Rulemaking Order* of November 25, 1992. That major decision is currently before the court of appeals. The Commission has not yet had the opportunity to submit its full justification for the permissive detariffing rules to the court of appeals and to secure an appellate decision that takes account of that justification. Indeed, the Commission has consistently maintained in the present case that the merits of the permissive detariffing policy are not properly at issue —in substantial measure because to argue the validity of the rules in the court of appeals in this case risked the agency's prejudging the rulemaking proceeding that then was ongoing. Although the court of appeals thought it appropriate to decide the validity of the rules on the basis of the rationale the agency gave when originally adopting them ten years

ago (Pet. App. 15a), the Commission's *Rulemaking Order* makes clear that much has happened since then. Many participants in the industry have come to rely on the permissive detariffing rules, and the practical advantages of the rules and their utility in promoting competition have been demonstrated. Moreover, Congress has taken subsequent action which the Commission views as legislative ratification of the permissive detariffing rules. *Id.* at 51a-55a. Nonetheless, review of the rules' validity by this Court would be premature unless and until a decision by the court of appeals sets aside those rules on review of the *Rulemaking Order* after full consideration of the Commission's justification.

2. We agree with MCI that the court of appeals was mistaken in characterizing the Commission's procedure here as a "shell game" or a deliberate attempt to avoid a challenge to the merits of its rules. The agency's initial deferral of a ruling pending the decision in its *Interexchange Competition* investigation was clearly warranted. The subject matter of that proceeding related directly to the policy judgments underlying the detariffing rule, and it might have produced relief that would have satisfied AT&T without addressing the difficult legal issues the permissive detariffing rules raise. Indeed, AT&T did not press the question of delay by filing a mandamus petition until after it found the outcome of the *Interexchange Competition* proceeding unsatisfactory.

The further delay pending a new rulemaking directed specifically to the detariffing rule itself was also justified. AT&T and MCI were obviously not the only parties having substantial interest in the rules:

Invalidation of the rules would have an adverse industry-wide impact on other carriers and on customers as well. Initiation of a rulemaking proceeding that would allow all those parties to participate in the decision making process was plainly warranted. Moreover, once the Commission initiated that proceeding, it adhered to as expeditious a schedule as it could in light of the number and variety of commenters, and the time necessary for them to formulate their views and for the agency and its staff to digest them. Finally, it is clear that the Commission acted with both good faith and speed in completing the rulemaking expeditiously and in bringing its action in that proceeding to the court's attention promptly while this case was still under submission in the D.C. Circuit. Yet in its subsequent decision the court of appeals never acknowledged the existence of the Commission's important rulemaking decision.

Under the circumstances, we believe the court of appeals' harsh criticism of the procedures used by the FCC to be unjustified. But that being said, we must also say that the court's decision on the procedural issue is unlikely to have any significant effect in future cases. The court acknowledged the general principles that an agency may make law by rulemaking or adjudication, and that an agency may secure a broad range of public comment when conducting rulemaking proceedings. Pet. App. 9a-10a. As we understand the decision, the only practical limitation it places on the agency is that the FCC may not dismiss a Section 208 complaint while going forward with a rulemaking proceeding. We are not aware of any prior case involving similar facts, and we assume

that there are not likely to be similar cases in the future. Given the peculiar facts of this case, the court's procedural holding does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 92-1684

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AMERICAN TELEPHONE & TELEGRAPH COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

The briefs in opposition submitted by the United States and AT&T—as well as critical developments in the past few days—confirm the need for plenary review.

I. THE LEGAL AND PRACTICAL IMPORTANCE OF THE ISSUES PRESENTED IN THIS CASE ARE NOT IN DISPUTE

No party disputes the importance of the issues raised by this case. The United States concedes that the first question presented in MCI's petition for certiorari "involves a matter of substantial importance." [1] Brief for the Federal Respondents in Opposition, at 10. The United States also agrees that "the court of appeals' rejection of the Commission's permissive tariffing rules is a matter

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[1] MCI's petition for certiorari described the Commission rule set forth in the *Fourth Report and Order*, 95 F.C.C. 2d 554 (1983), as the "permissive detariffing rule." Because respondents have

of substantial concern" because "the rules represent a 'cornerstone' of its regulation of the long-distance industry, and their removal is likely to have an adverse and anticompetitive impact on many providers of telecommunications services and their customers." *Id.* at 11. Nor does AT&T dispute that invalidation of the FCC's permissive tariffing rule will require wrenching and destructive changes in the long-distance industry, which has been governed by that rule for a decade. Indeed, AT&T is pursuing this case precisely because it hopes to exploit the anticompetitive potential created by invalidation of this "cornerstone" of the Commission's regulatory structure.

II. THIS COURT SHOULD NOT DEFER CONSIDERATION OF THESE SUBSTANTIAL QUESTIONS TO A FUTURE CASE

The United States opposed plenary review solely on the ground that the "matter of substantial importance" presented in MCI's petition might be better addressed upon review of another decision from the D.C. Circuit—the same court that issued the decision at issue in the instant petition. In particular, the United States urged that this Court await the D.C. Circuit's ruling on AT&T's challenge to the Commission's *November 25th Report and Order*,[2] which reaffirms the Commission's commitment to the permissive tariffing rule.

That objection to review no longer has any force. On June 4, 1993, the D.C. Circuit summarily reversed the Commission's *November 25th Report and Order*. The substance of the panel opinion consisted entirely of the following:

> Upon consideration of [AT&T's] motion for summary decision, the opposition thereto and the reply, it is

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characterized it as the "permissive tariffing rule," MCI will adopt that characterization in this reply.

[2] 7 F.C.C. Rcd 8072 (1992).

> ORDERED that the motion be granted and the order of the Federal Communications Commission (FCC) be summarily reversed. The merits of the parties' positions are so clear as to warrant summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1774 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The decision of this court in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), conclusively determined that the FCC's authorization of permissive detariffing violates section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1998).

Order, *American Tel & Tel. Co. v. Federal Communications Comm'n*, No. 92-1628 (D.C. Cir. June 4, 1993) (reprinted as an appendix to this reply). There is thus no need to await further action by the D.C. Circuit. Nor should the Court defer consideration until plenary review is sought with respect to this new ruling, for two reasons.

First, the critical legal issue—whether the statutory language in Section 203(b) empowering the Commission to "modify any requirement" of Section 203 justifies the permissive tariffing rule—is a pure question of statutory interpretation that was squarely decided by the Court of Appeals. As in any *Chevron* case, the Court in this case must "look to the particular statutory language at issue, as well as the language and design of the statute as a whole," *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), to determine whether the ordinary meaning of Section 203 can reasonably bear the interpretation advanced by the Commission. To the extent the Commission's *November 25th Report and Order* bears upon that question of statutory interpretation, it is available to this Court. *See* Pet. App. 33a-66a.

Second, there is an immediate need to end the serious real-world harms that have followed upon the D.C. Circuit's invalidation of the *Fourth Report and Order*.

On June 8, 1993, AT&T filed an action in the District Court for the District of Columbia seeking an emergency injunction prohibiting MCI from providing service to major national accounts—including Chrysler Corp., Citibank, K Mart Corp. and Bank of America—based on the Court of Appeals' interpretation of Section 203. Previously, AT&T unleashed a barrage of litigation seeking massive damages against MCI, Sprint, and another major competitor for alleged violations of Section 203.[3] AT&T has threatened similar suits against some or all of the more than four hundred smaller non-dominant carriers who provided nontariffed services in conformity with the *Fourth Report and Order*.[4] Dominant local exchange carriers, such as Bell Atlantic and NYNEX, have similarly initiated damage actions—based solely on the D.C. Circuit decision—against their nascent competitors for alleged violations of Section 203.[5] These actions are merely the tip of the iceberg.

More broadly, the D.C. Circuit's ruling, and AT&T's aggressive litigation strategy based upon that ruling, have created a climate of confusion and uncertainty in the long-distance market. AT&T has assiduously cultivated doubt in the customers of its competitors as to the legality of their relationships with MCI and other long-distance providers, and has endeavored to use this uncertainty to intimidate prospective customers into refusing to deal

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[3] *See American Telephone & Telegraph Co. v. MCI Communications Corporation*, No. 93-0283 (SSH) (D.D.C.); *American Telephone & Telegraph Co. v. Williams Telecommunications Group, Inc. et al.* No. 93-0284 (SSH) (D.D.C.); *American Telephone & Telegraph Co. v. Sprint Communications Company, L.P.*, No. 93-0285 (SSH) (D.D.C.).

[4] *See Telecommunications Reports*, Feb. 15, 1993 at 1, 2.

[5] *See Bell Atlantic Telephone Companies v. MFS Telecom, Inc., Atlantic Communications Enterprises, Baltimore Gas and Electric Company, Eastern Telelogic Corp., M H Lightnet, Inc., Penn Access Corp., Teleport Communications Group, Valleynet, and Local Area Communications Inc.*, FCC File Nos. E-93-13 to E-93-20; *New York Telephone Company, New England Telephone and Telegraph Company v. Teleport Communications New York*, FCC File No. E-93-88.

with MCI or other AT&T competitors.[6] Deferring review would permit this anticompetitive strategy largely to succeed.

The enormous legal and practical impact of the Court of Appeals' decision warrants immediate plenary review. For this reason, AT&T's suggestion that the case presents a garden variety dispute over the application of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), misses the mark.[7] This Court has repeatedly granted certiorari to review decisions misapplying *Chevron*—despite the absence of any conflict among the circuits—when the ruling threatened the foundations of important agency policies. *E.g.*, *National R.R. Passenger Corp. v. Boston and Maine Corp.*, 112 S. Ct. 1394 (1992); *Pension Benefit Guarantee Corp. v. LTV Corp.*, 496 U.S. 633, 643-44 (1990). Plenary review in such circumstances is particularly necessary to ensure that reviewing courts respect "the proper roles of the political and judicial branches" and do not usurp the agency's appropriate policymaking functions on matters of substantial concern. *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991). *See also Chevron*, 467 U.S. at 866 ("federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do"). That justification is fully applicable here.

III. AT&T'S DEFENSE OF THE APPEALS COURT'S RULING CANNOT WITHSTAND SCRUTINY

AT&T argues that certiorari is unwarranted because the decision below was correct on the merits. But AT&T does not begin to come to grips with the serious errors of statutory construction which led the Court of Appeals to deny appropriate deference to the FCC's policy choices.

AT&T devotes virtually no effort to analyzing the text of Section 203. Nor does AT&T respond to the textual

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[6] *See, e.g., Amicus Brief of Custom Network Services Users Group*, FCC File No. E-89-297 (May 21, 1993).

[7] *See* AT&T's Brief in Opposition at 12.

analysis set forth in MCI's petition for certiorari. *See* Petition at 15-23. That textual analysis demonstrated that the ordinary meaning of Section 203(b), which authorizes the Commission to "modify any requirement" of Section 203, is sufficiently capacious to justify the Commission's tariffing rule. In particular, AT&T does not deal with the undeniable fact that in ordinary usage the word "modify" can mean "to make minor changes in" *or* "to make basic or fundamental changes in, often to give a new orientation to or serve a new end." Webster's Ninth New Collegiate Dictionary 763 (1988). As this Court has repeatedly made clear, the "existence of alternative dictionary definitions . . . each making some sense under the statute itself indicates that the statute is open to interpretation." *Boston and Maine Corp.*, 112 S. Ct. at 1402; *Sullivan v. Everhart*, 494 U.S. 83, 91-92 (1990).

Nor can AT&T explain away the language in Section 203(c), which plainly contemplates that the Commission will exempt carriers from tariff filing requirements under some circumstances. 47 U.S.C. § 203(c) ("No carrier, unless otherwise provided by or under the authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published"). AT&T argues that the remaining language of Section 203(c), which prohibits carriers from providing non-tariffed service, negates MCI's argument. *See* AT&T Brief in Opposition at 14. But AT&T's sweeping claim does not survive a close reading of the statutory language.

Section 203(c) prohibits carriers from departing from rates and charges "specified in the schedule[s] then in effect" or from extending special privileges not specified "in such schedule[s]." The "schedules" to which the remaining language of Section 203(c) refers are plainly the schedules that must be filed pursuant to the first sentence of Section 203(c). However, the first sentence of Section 203(c) expressly contemplates the possibility that the Commission will exempt some carriers from tariff filing requirements in some instances. The second

sentence of Section 203(c) thus must be understood to prohibit nontariffed service only in those instances where tariffs are required under the first sentence. AT&T's contrary interpretation—that no communications services can *ever* be provided absent filed tariffs—would completely nullify the effect of the "unless otherwise provided" clause.

Because the Court of Appeals' ruling cannot be sustained on the basis of a careful reading of the text of Section 203, AT&T seeks to divert attention by devoting the bulk of its analysis to a different statute—the Interstate Commerce Act ("ICA")—and to this Court's decision interpreting the ICA in *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). Indeed, AT&T argues that the ruling below "is compelled by this Court's decision . . . in *Maislin*," AT&T Brief in Opposition at 9, even though that decision played almost no role in the Court of Appeals' analysis. *See* Pet. App. 17a n.12.

Maislin, however, cannot dictate the result here because Section 203 of the Communications Act differs in critical respects from the statutory provisions at issue in that case. It is telling that AT&T, though claiming that the operative provisions of the two statutes are "worded indistinguishably,"[8] never quotes the critical statutory language. Section 10762 of the ICA, the provision at issue in *Maislin*, delegates to the ICC only a limited authority to "change the other requirements of this section if cause exists in particular instances or as they apply to special circumstances." 49 U.S.C. § 10762(d)(1). Section 203(b) of the Communications Act states that the FCC may "in its discretion . . . modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions." 47 U.S.C. § 203(b). Thus, whereas Congress has plainly delegated to the FCC the broad authority to promulgate

[8] AT&T Brief in Opposition at 10.

"general order[s]" that make fundamental changes in Section 203's regulatory design in order to serve new regulatory goals, Congress limited the authority of the ICC to granting case-specific changes in tariff requirements "in particular instances."

Structural differences in the two statutory schemes also dictate that the statutes be interpreted differently. As the FCC explained in the *November 25th Report and Order*:

> the motor carrier analogs to Sections 203(a) and (c) are contained in separate sections of the ICA—49 U.S.C. §§ 10762(a)(1) and 10761(a), respectively. The motor carrier analog to Section 203(b), which provides modification authority, appears in ICA Section 10762(d)(1) and expressly applies only to the requirements of this section [10762]." Thus, on its face, the ICC's power to modify tariff requirements does not apply to Section 10761(a)'s command (akin to that in Section 203(c)) that motor carriers "shall provide . . . transportation only if the rate for the transportation or service is contained in a tariff. . . ." As set forth above, the modification authority in Section 203(b) applies, by its terms, to S. Ct. at 2271 (emphasis in oirginal]. Not only is and the prohibition against untariffed offerings (Section 203(c)).

Pet. App. 47a. Indeed, the Second Circuit has expressly rejected the argument that the FCC's modification power under Section 203(b) is no greater than that of the ICC under the ICA. *See AT&T v. FCC*, 503 F.2d 612, 617 (2d Cir. 1974).

Other indicia of congressional intent confirm that the two statutory schemes should not be treated identically in this context. As the FCC explained:

> the *Maislin* court construed recent statutory changes to the ICA as evidence of Congressional intent to limit any exception authority. Specifically, the Court noted that Congress had amended the ICA to exempt *contract* carriers from the requirements of Section 10761(a), thus "demonstrating that Congress is

> aware of the [Section 10761(a)] requirement and has deliberately chosen not to disturb it with respect to motor *common* carriers." [quoting *Maislin*, 110 S. Ct. at 2271 (emphasis in original)]. Not only is there a lack of similar corroborating legislative history limiting the FCC's exception authority under Section 203(c), but the legislative history of recent legislation involving the tariff requirements of operator service providers supports the FCC's interpretation of Section 203.

November 25th Report and Order, Pet. App. 47a-48a. Furthermore, because this Court has never held that Section 203 requires tariffing in all circumstances, *stare decisis* principles do not foreclose the agency's interpretation, as they did in *Maislin*. Thus, for these reasons, AT&T's facile analogy to *Maislin* is no substitute for close reading of the statutory language at issue—Section 203 of the Communications Act.[9]

The Court of Appeals' decision has effectively shackled the FCC to an anachronistic regulatory regime that is thwarting competition and harming consumer welfare in the long-distance market. Even the Court of Appeals "had no quarrel" with the policy objectives of the permissive tariffing rule, which has, according to the Commission, "played a substantial role in the development of competition in the interexchange market and the increased choices for customers with respect to carriers and prices." [10] It is one thing to require such a result when—as in *Maislin*—a statute enacted by Congress has left no

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[9] There is no merit to AT&T's argument that TOCSIA is irrelevant to the meaning of Section 203. *See* AT&T Brief in Opposition at 15. Although TOCSIA was not intended to "*alter* the obligations, powers or duties of common carriers," 47 U.S.C. § 226(i) (emphasis added), neither MCI nor the FCC contend that TOCSIA altered the requirements of Section 203. Rather, TOCSIA confirms that Congress was apprised of and acted against the backdrop of the FCC's permissive tariffing rule. Thus, TOCSIA ratifies congressional agreement with the FCC's interpretation of Section 203(b).

[10] *In the Matter of Tariff Filing Requirements for Nondominant Common Carriers*, FCC 93-103, February 19, 1993, at ¶ 10.

other choice, but it is quite another to reach the same result when the statute expressly delegates flexible powers to the regulatory agency to reorient the regulatory regime to serve new ends. There is no doubt that the Court of Appeals' decision is bad policy. As demonstrated, it is also bad law and should be reversed.

IV. THE ADMINISTRATIVE LAW ISSUE PRESENTED IN THE PETITION ALSO MERITS REVIEW

The United States agrees that the Court of Appeals' criticisms of the Commission were unwarranted, and that the Commission's procedural disposition of this case was proper. *See* United States' Brief in Opposition at 13. The United States nonetheless contends that plenary review of this issue is unwarranted because the Court of Appeals has simply precluded the Commission from dismissing a complaint while going forward with a rulemaking. This argument ignores the principle on which the Court of Appeals actually decided the case. The court required agency adjudicators to resolve challenges to an agency's statutory authority to promulgate a rule even if the party raising the challenge may properly be denied relief on a ground unrelated to the validity of the challenged rule. That principle imposes severe constraints on agencies seeking to resolve important public controversies appropriately.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1992

No. 92-1628

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
Respondents

INTERNATIONAL BUSINESS MACHINES CORPORATION, *et al.*,
Intervenors

And Consolidated Case No. 92-1666

BEFORE: Edwards, Williams and D. H. Ginsburg, Circuit Judges

ORDER

Upon consideration of the motion for summary decision, the oppositions thereto and the reply, it is

ORDERED that the motion be granted and the order of the Federal Communications Commission (FCC) be summarily reversed. The merits of the parties' positions are so clear as to warrant summary action. *See Cascade Broadcasting Group, Ltd. v. FCC*, 822 F.2d 1172, 1774 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*,

627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980). The decision of this court in *American Tel. & Tel. Co. v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) conclusively determined that the FCC's authorization of permissive detariffing violates section 203(a) of the Communications Act, 47 U.S.C. § 203(a) (1988).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 15.

Per Curiam